APPENDIX

FILED
DEC 6 1977

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-6767

FRANK R. SCOTT AND BERNIE L. THURMON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED MAY 18, 1977
CERTIORARI GRANTED OCTOBER 11, 1977

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UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA.

UNITED STATES OF AMERICA

v.

FRANK RICARDO SCOTT et al.

UNITED STATES OF AMERICA

v.

BERNIS L. THURMON et al:

Crim. Nos. 1088-70, 1089-70.

April 29, 1971.

MEMORANDUM ON MOTIONS

WADDY, District Judge.

In criminal Case No. 1088-70 Frank Ricardo Scott, also known as "Reds," Albert Lee, also known as Alphonso H. Lee, Reginald Clifton Jackson, also known as "Zeke," Leroy Houston, also known as "Big Boy" and Teri A. Lee, were charged in an indictment with conspiring together "and with other persons known and unknown to the Grand Jury" to violate (1) Section 4705(a), Title 26, United States Code and (2) Section 174, Title 21, United States Code.

Defendant, Scott, was also charged in Counts 8 and 12 of the indictment with using a communication facility "* * * in committing, causing and facilitating the commission of, and attempting to commit an act and acts constituting a violation of Section 4705(a), Title 26, United States Code, and conspiring to commit that offense"—an offense made punishable by 18 U.S.C., Section 1403. In Counts 13 and 14 he is charged with violations of Title 26 U.S.C., Section 4704(a), and in Counts 16 and 17 he is charged with violations of 21 U.S.C., Section 174.

Defendant, Albert Lee, was also charged in Counts 3 and 6 of the indictment with using a communication facility "in committing, causing and facilitating the commission of, and attempting to commit an act and acts constituting a violation of Section 4705(a), Title 26, United States Code and conspiring to commit that offense." In Count 15 he is charged with a violation of Title 26 U.S.C., Section 4704

(a), and in Count 18 he is charged with a violation of Title 21 U.S.C., Section 174. Defendant, Albert Lee, is a fugitive.

Defendant, Jackson, was also charged in Counts 10 and 11 of the indictment with using a communication facility "in committing, causing and facilitating the commission of, and attempting to commit an act and acts constituting a violation of Section 4705(a), Title 26, United States Code, and conspiring to commit that offense."

Defendant, Houston, was also charged in Counts 4 and 5 of the indictment with using a communication facility "in committing, causing and facilitating the commission of, and attempting to commit an act and acts constituting a violation of Section 4705(a), Title 26, United States Code, and conspiring to commit that offense." Defendant, Houston, has entered a plea of "Guilty" to Count 4 and the Government has announced its intention to dismiss the remaining charges against him at the time of sentencing.

Defendant, Teri A. Lee, was also charged in Counts 7 and 9 of the indictment with using a communication facility "in committing, causing and facilitating the commission of, and attempting to commit an act and acts constituting a violation of Section 4705(a), Title 26, United States Code, and conspiring to commit that offense." Teri A. Lee is a fugitive.

On the same day that the indictment was returned in Criminal No. 1088-70 another indictment was returned in Criminal Case No. 1089-70 in which Bernis Lee Thurman, also known as Benjamin Thornton, Geneva Jenkins, also known as Geneva Thornton, George Jenkins, Alfred D. Spencer, Bernard Smith, Johnny Duval Williams, also known as Duke, Costello V. Williams, Chloe V. Daviage, also known as Mickey, and Evelyn A. Abston were charged with conspiring together "and with other persons known and unknown to the Grand Jury" to violate (1) Section 4705(a), Title 26, United States Code, and (2) Section 174, Title 21, United States Code.

Defendant, Thurmon, was also charged in Counts 13 and 17 of the indictment with using a communication facility "in committing, causing and facilitating the commission of, and attempting to commit an act and acts constituting a violation of Section 4705(a), Title 26, United States Code, and conspiring to commit that offense.

Defendant, Geneva Jenkins, was also charged in Counts 12 and 14 of the indictment with using a communication

facility "in committing, causing and facilitating the commission of, and attempting to commit an act and acts constituting a violation of Section 4705(a), Title 26, United States Code, and conspiring to commit that offense."

Defendant, George Jenkins, was also charged in Counts 3 and 4 of the indictment with using a communication facility "in committing, causing and facilitating the commission of, and attempting to commit an act or acts constituting a violation of Section 4705(a), Title 26, United States Code, and conspiring to commit that offense." In Count 20 he is charged with a violation of Title 26, United States Code, Section 4704(a), and in Count 23 he is charged with violating Title 21, United States Code, Section 174.

Defendant, Alfred D. Spencer, was also charged in Counts 6 and 16 of the indictment with using a communication facility "in committing, causing and facilitating the commission of, and attempting to commit an act or acts constituting a violation of Section 4705(a), Title 26, United States Code, and conspiracy to commit that offense."

Defendant, Bernard Smith, was also charged in Counts 11 and 15 of the indictment with using a communication facility "in committing, causing and facilitating the commission of, and attempting to commit an act and acts constituting a violation of Section 4705(a), Title 26, United States Code, and conspiring to commit that offense." He was charged in Count 21 with a violation of Title 26, United States Code, Section 4704(a) and in Count 24 with a violation of Title 21, United States Code, Section 174. This defendant has entered a plea of "Guilty" to an Information charging him with conspiracy to sell narcotics in violation of Title 26, United States Code, Section 4704(a), and the Government has announced its intention to dismiss the charges contained in the indictment at the time of sentencing.

The defendant, Johnny Duval Williams, was also charged in Counts 7 and 10 with using a communication facility "in committing, causing and facilitating the commission of, and attempting to commit an act and acts constituting a violation of Section 4705(a), Title 26, United States Code, and conspiring to commit that offense." He was charged in Count 22 jointly with Costello V. Williams with violating Section 4704(a), Title 26, United States Code, and in Count 25, jointly with Costello V. Williams, with a violation of Section 174, Title 21, United States Code. Johnny Duval

Williams has entered a plea of "Guilty" to the first count of the indictment charging him with conspiring to violate Section 4705(a), Title 26, United States Code, and the Government has announced its intention to dismiss the remaining charges of the indictment against him.

In addition to the two conspiracy counts and the charges made against her jointly with Johnny Duval Williams in Counts 22 and 25 mentioned above, the defendant, Costello V. Williams, was also charged in Counts 18 and 19 of the indictment with using a communication facility "in committing, causing and facilitating the commission of, and attempting to commit an act and acts constituting a violation of Section 4705(a), Title 26, United States Code, and conspiring to commit that offense." Costello V. Williams has entered a plea of "Guilty" to Count 22 of the indictment and the Government has announced its intention to dismiss the remaining counts of the indictment applicable to this defendant.

The defendant, Daviage, was also charged in Counts 5 and 8 of the indictment with using a communication facility "in committing, causing and facilitating the commission of, attempting to commit an act and acts constituting a violation of Section 4705(a), Title 26, United States Code, and conspiring to commit that offense."

The defendant, Abston, was also charged in Count 9 of the indictment with using a communication facility "in committing, causing and facilitating the commission of, and attempting to commit an act and acts constituting a violation of Section 4705(a), Title 26, United States Code, and conspiring to commit that offense. The defendant, Abston, has been severed from this case because of her illness and hospitalization.

Frank Ricardo Scott, Albert Lee and Leroy Houston, defendants in Criminal No. 1088-70 are named as co-conspirators in Count 1 of Criminal No. 1089-70 but not as defendants therein. Frank Ricardo Scott and Leroy Houston, are named as co-conspirators in Count 2 of Criminal No. 1089-70 but not as defendants therein.

Bernis Lee Thurmon, a defendant in Criminal No. 1089-70 is named as a co-conspirator in Count 1 of Criminal No. 1088-70 but not as a defendant therein. The same allegations are incorporated by reference in Count 2 of Criminal No. 1088-70.

Both of these indictments are the result of information obtained by the use of a wire tap on telephone number 483-2948 subscribed to by "Geneva Thornton," located at #603, 1425 N Street, Northwest, Washington, D. C., and alleged to have been commonly used by Bernis Lee Thurmon. The intercept was authorized pursuant to Section 2518, Title 18, United States Code, by U. S. District Judge John Lewis Smith on January 24, 1970.

The defendants in each case have filed or joined in similar pre-trial motions and the Government has filed a motion to consolidate the two cases for trial. All motions in both cases were heard in a joint proceeding acquiesced in by all parties and submitted to the Court for its determination.

1. CONSTITUTIONALITY OF THE STATUTE

All defendants have attacked the constitutionality of the statute authorizing the interception. Their primary argument is that the statute contravenes the 4th Amendment restrictions against unreasonable searches and seizures.

The motions before the Court challenge the validity of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, particularly Section 2518, Title 18, United States Code, which establishes the procedure for the interception of wire and oral communications.

As already indicated the Fourth Amendment to the Constitution of the United States provides the constitutional framework within which to test the validity of the statute. This amendment dictates that people have a right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and that this right "shall not be violated and no warrant shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized." The amendment does not bar all searches and seizures but only those that are unreasonable. The amendment outlawed the "general warrant," and its basic purpose "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Camara v. Municipal Court, 387 U.S. 523, 528, 87 S.Ct. 1727, 1730, 18 L.Ed.2d 930. Thus the issue confronting this Court is whether 18 U.S.C. § 2518 is so broad as to result in the authorization for a general warrant permitting an unreasonable search and seizure in violation of the 4th Amendment.

The United States Supreme Court faced a similar problem in Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967). There it held the New York permissive eavesdrop statute, N.Y.Code Crim.Proc. § 813-a, to be unconstitutionally broad in its sweep "resulting in a trespassory intrusion into a constitutionally protected area" and thus violative of the 4th and 14th Amendments. The Court condemned the New York statute's "blanket grant of permission to eavesdrop • • • without adequate judicial supervision or protective procedures," 388 U.S. at 60, 87 S.Ct. at 1884 and reiterated the 4th Amendment requirement that a neutral and detached authority be interposed between the police and the public. It held that this authority must independently find probable cause, and that "warrants may only issue 'but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized'." 388 U.S. at 55, 87 S.Ct. at 1881.

In striking down the constitutionality of the New York Statute the Supreme Court delineated four basic 4th Amendment requirements of particularity that must be a part of any statute authorizing wiretapping or eavesdropping. These requirements are as follows:

1. The statute must provide that probable cause be established in the application and order for the belief that a *particular offense* has been or is being committed: a particular description of the *property* (conversations or communications) to be seized, and not merely the name or identity of the person whose conversations are to be seized.

2. The statute must require particularity as to the duration of the intrusion which shall not be so long as to be "the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause." The statute must provide for prompt execution of the order and for a new showing of probable cause upon each application for an extension of the original authorization.

3. The statute must require particularity as to the termination date once the particular conversation sought is seized, rather than leaving such cut-off date to the discretion of the officer.

4. The statute must provide for either notice to the persons whose conversations are to be seized or a showing of special facts or exigent circumstances necessitating the withholding of notice. The statute must also require a

return on the warrant in order to limit the discretion of the officer as to the use of the seized conversations which may be of innocent as well as guilty parties.

The requirement of a showing of probable cause before an independent judicial officer imposing the necessary safeguards was reiterated by the Supreme Court in Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). In that case the Supreme Court held that although the eavesdropping officers had exercised great restraint and limited their intrusion into the petitioner's privacy, the intrusion was nevertheless unlawful because it lacked the safeguards of judicial restraints independently imposed. It held that the agents should have been required "before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate." They should have been "compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order," and they should have been directed to notify the authorizing magistrate after completion of the search in detail of all that had been seized."

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 represents an attempt by Congress, among other things, to structure a limited system of wire surveillance and electronic eavesdropping within the framework of the 4th Amendment and the guidelines of *Berger, Katz,* and other Supreme Court decisions for use by law enforcement officers in fighting crime. An examination of the portions of the statute relevant to these motions reveals that they track the constitutional requirements of particularity, judicial restraints and supervision, and the other protective procedures outlined by the Supreme Court in *Berger* and *Katz.*

The Statute vests control and supervision of its use in Judges of the U.S. District Court and the U.S. Court of Appeals. (See 18 U.S.C. §§ 2510(9) (a) and 2516(1)). Section 2518(1), Title 18, U.S. Code, requires that the application for a wiretap must contain certain information and be made to such judge who may require additional testimony or documentary evidence in support of the application, 2518(2), Title 18, U.S. Code. Section 2518(3) provides for an independent determination by the judge and

"(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or

approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person."

It is clear that these statutory provisions require that a neutral and detached authority be interposed between the police and the public and that authority is required to make certain specific findings of probable cause before authorizing the interception.

The first part of the *Berger* outline as to particularity is met by Section 2518(1) (b), Title 18, which requires that the *application* contain a "full and complete statement of the facts relied upon by the applicant to justify his belief that a [wiretap] order should be issued." That statement must include:

"(i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, [and] (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;".

Section 2518(4) similarly provides that the *order* shall specify:

"(a) the identity of the person, if known, whose communications are to be intercepted;

"(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

"(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

"(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application;".

It is thus apparent that the first requirement of *Berger* has been incorporated in the wire interception statute at issue.

The second part of the *Berger* outline is also sufficiently incorporated in the statute as can be seen by an analysis of the following sections:

(1) Section 2518(1) (d) requires the application to specify the period of time for which the intercept is required, as well as the facts necessary for the probable cause to believe that the intercept should not automatically terminate when the described type of communication is first intercepted;

(2) Section 2518(1) (f) requires upon an application for an extension a showing of what has resulted so far or an explanation of why there have been no results;

(3) Section 2518(4) (e) requires that the order specify the time period for which the intercept is authorized and whether it will automatically terminate when the described communication is first obtained; and

(4) Section 2518(5) requires that the authorization be no longer than necessary to achieve the objective and in no event longer than thirty (30) days. Extensions may only be granted upon a separate showing of probable cause for each extension. All orders and extension must be executed as soon as practicable.

The third part of the *Berger* outline is provided for in Sections 2518(1) (d), 4 (e), (5) and (6) which require the

order and application to set out (1) the time for which the intercept is authorized; (2) a maximum intercept period of thirty days; (3) a new showing of probable cause for each extension of the authorization order; and (4) a system for reporting on the results to the authorizing judge. All of the above tend to remove discretion from the officer executing the order.

The fourth and final part of the *Berger* outline is provided for in Section 2518(8) which requires the recording of all intercepted communications and the preservation of them under the directions of the authorizing judge as well as notice by that judge to the persons named in the order within a reasonable time after the termination of that order but not later than ninety (90) days thereafter.

[1] On the basis of the preceding analysis, it is the opinion of this Court that the constitutional requirements of particularity, judicial restraint and supervision, and protective procedures that were expounded by the Supreme Court in *Berger* and *Katz* were adequately provided for in 28 U.S.C. § 2518 and that said statute is, therefore, constitutional on its face. Accordingly, the motions of all defendants to suppress based upon the alleged unconstitutionality of the statute are denied.

2. SUFFICIENCY OF THE APPLICATION AND AFFIDAVIT

[2] Defendants seek to suppress the evidence in this case on the ground that the application and affidavit submitted to Judge Smith for the initial intercept order on January 24, 1970, were insufficient on their face to establish probable cause. Such a motion tests only the sufficiency of matters presented to the issuing authority. The testimony adduced and evidence received at the hearing of the motion cannot be used to augment an otherwise defective affidavit, but if matters are disclosed which discredit or impeach assertions in the affidavit they must be considered in determining whether probable cause in fact existed. Thus the wiretap order in this case must stand or fall on the contents of the application and affidavit in support thereof. United States v. Roth, 391 F.2d 507 (7th Cir., 1967).

The main thrust of defendants' argument is that the application fails to provide the information required by Section 2518(1) (b) and (c) which provide as follows:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:"

• • •

"(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which the place where the communication is to be intercepted, (iii) a particular description of the type of communication sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

"(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous:".

With respect to subsection (b) (i) "details as to the particular offense that has been, is being, or is about to be committed," Paragraph 1 of Agent Cooper's affidavit alleges an investigation by the Bureau of Narcotics and Dangerous Drugs and the Metropolitan Police Department of "narcotic wholesale trafficking activities" of certain known and unknown persons in a "conspiracy." Paragraphs 5, 6, 7, 8, 9, 10 and 10a alleged particular facts of continuing narcotics offenses involving some of the alleged conspirators. The affidavit speaks of an employee of "Al," one of the alleged conspirators, as selling several hundred dollars worth of heroin per pay; of members of the Bureau of Narcotics and Dangerous Drugs and of the Metropolitan Police making undercover "buys" of narcotics at the Fantasy Restaurant, alleged to be owned by one of the conspirators. It details two surveilled purchases of "wholesale" quantities of heroin from members of the alleged conspiracy and another purchase of a large quantity of narcotics from Bernis Thurman. The affidavit described the delivery of a sufficient amount of "lactose" to Albert Lee's

home to cut pure heroin into 17,000 capsules for street sale; and details the widespread use of telephones by the participants to carry on the alleged conspiracy.

[3] The Court finds that the affidavit complies with the requirements of subparagraph (b) (i).

[4] With respect to sub-paragraph (b) (ii), the requirement of a particular description of the nature and location of the facilities to be intercepted is clearly satisfied by the following language of Paragraph 2 of Cooper's Affidavit:

> "This application is submitted for an Order authorizing the interception of wire communications at 1425 N Street, N. W., Apartment 603, Washington, D. C., telephone number 483-2948. The subscriber to number 483-2948 is listed as Geneva Thornton."

[5] The requirements of sub-paragraph (b) (iii), "a particular description of the type of communications sought to be intercepted," are satisfied by the following allegations of Paragraph 2 of Cooper's Affidavit:

> "The type of communications sought to be intercepted are conversations among individuals in New York, New Jersey, Philadelphia, Virginia, and Washington which will reveal the details of a scheme used to smuggle narcotics into the United States, transport such narcotics into the Washington, D. C. area and distribute them in this area."

Sub-paragraph (b) (iv) requires a statement as to "the identity of the person, if known, committing the offense and whose communications are to be intercepted."

Paragraph 1 of the affidavit names certain known alleged conspirators and states that others are unknown. Paragraph 3 also contains the names of certain alleged conspirators. Among the named alleged conspirators is "Bernis Lee Thurman, also known as Benjamin Thornton." Bernis Lee Thurman is described in Paragraph 3B:

> "He is 5' 11" tall and weighs 165 pounds. He resides at 1425 N Street, N.W. Apt. 603. Thurman is known to the Metropolitan Police Department I.D. Bureau as #190647 and to the Federal Bureau of Investigation as #753 570D."

In Paragraph 8 Thurman is alleged to be "Al's" right

hand man and that he had been identified by the resident manager of 1425 N Street, N. W. "as the person she knows as Benjamin Thornton, who rents Apartment 603 at that address." "Al" was identified as Albert Lee, also known as Alfonso H. Lee, who lived at 5195 Linnean Terrace, Northwest, and who was described by an informant as one of the largest dealers of narcotics in the Washington, D. C. area. Similar information concerning Thurman is given in Paragraphs 10 and 10a of the affidavit. Thurman's close association with "Al" is also shown by the affidavit. This information was clearly sufficient to identify Thurman and to associate him with telephone No. 483-2948 upon which the wiretap was sought.

The Court finds that the affidavit sufficiently complies with the statute and that the particularizations and safeguards meet the constitutional standards required by *Berger, supra,* and *Katz, supra.*

We turn now to a consideration of whether the affidavit of Cooper, containing the particularizations mentioned above, was sufficient to establish probable cause for the wiretap order.

[6, 7] In considering the question of probable cause we must keep in mind that "the term 'probable cause' • • • means less than evidence which would justify condemnation," Locke v. United States, 7 Cranch 339, 348, 3 L.Ed 364, and that probable cause may be found "upon evidence which is not legally competent in a criminal trial." United States v. Ventresca, 380 U.S. 102, 107, 85 S.Ct. 741, 745, 13 L.Ed.2d 684, citing Draper v. United States, 358 U.S. 307, 311, 79 S.Ct. 329, 3 L.Ed.2d 327. We also keep in mind that a neutral and detached magistrate (under this statute a Federal judge) must draw the inferences from such evidence. Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436. The magistrate cannot find probable cause upon the mere conclusions of the affiant but must have details of the underlying circumstances in the affidavit Aquilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723. Further, an affidavit for a search warrant may be based on hearsay information so long as the magistrate is informed of some of the underlying circumstances supporting the affiant's conclusions and his belief that any informant involved, whose identity need not be disclosed, was credible or his information reliable. Aquilar v. Texas,

supra. United States v. Long, 439 F.2d 628 (U.S.Ct. of App., D.C., decided Jan. 25, 1971).

We therefore find a two-pronged test that must be applied to Cooper's affidavit. The first is whether there is a showing of facts upon which the informant based his information, and the second is whether there is a showing of a basis which the affiant concluded that the informant was either credible or his information reliable.

The main informant relied upon for the information in the Cooper affidavit is SE 54, although others are mentioned. The affidavit relates some of the underlying circumstances upon which SE 54 based its information. It details that SE 54 was itself involved in the narcotics drug traffic; that it became an employee of "Al"; that while picking up its own narcotics it had personally observed numerous other packages of narcotics upon which were written the names of different persons; that "Al" had told it that he came to the District of Columbia area from New York and went into the illicit narcotics business; that "Al" had told it that he frequently went to New York and Virginia to engage in narcotics transactions; that it had observed the close relationship between "Al" and Bernis Lee Thurman and knew Thurman as "Al's" right hand man; that it had contacted a female named "Bernice" at the Fantasy Restaurant for the purpose of setting up a narcotics transaction with "Al"; that it has seen "Al" on more than one occasion carrying a bag containing more than 3 kilos of white powder which "Al" said was pure heroin; that it had called "Al's" telephone and arranged for the delivery of a wholesale quantity of heroin on two different occasions; that on or about January 12, 1970, it learned that Mrs. Teri A. Lee was temporarily managing "Al's" business and that it should make its order by calling 483-2948; that it called that number, spoke with Bernis Lee Thurman, ordered a large quantity of narcotics from Thurman, which narcotics were delivered to SE 54.

The above-mentioned circumstances, all of which plus others, are set out in the Cooper affidavit are clearly sufficient to satisfy the first prong of the test.

The second prong of the test is equally met by the affidavit. It states that SE 54's reliability had been proven in the past; i. e. on two occasions its information directly resulted in arrests of subjects for violations of the Harrison Narcotics Act; its information had been checked and

verified by members of the Metropolitan Police Department; a female by the name of "Bernice Davis" is the licensed manager of Fantasy; the two telephone calls SE 54 made to "Al" in which it ordered wholesale quantities of heroin were monitored by the police; the delivery of these orders were surveilled by police officers, one of which was made by a man whose identity was verified by the police as Bernis Lee Thurman, and the others by "Al" and Thurman. A review of the affidavit as a whole, together with the details mentioned above constitute an ample showing of a basis upon which the affiant concluded that the informant was credible and its information reliable.

It is obvious from the above that both requirements of the *Aquilar* test have been met. Defendants' arguments that probable cause was not shown because the affidavit alleges only one incident of the use of telephone No. 483-2948 in connection with a narcotics transaction and that that transaction was too remote because of the time lapse between the date of the transaction and the date of the affidavit ignore the remaining allegations of the affidavit and are unreasonably restrictive. Mr. Justice Rutlege, writing for the Court in Brinegar v. United States, 338 U.S. 160 at 175, 69 S.Ct. 1302 at 1310, 93 L.Ed. 1879 states:

> "In dealing with probable cause, however, as the very name implies, we deal with probabilities These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved."

In United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684, Mr. Justice Goldberg wrote:

> "These decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion.
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> • • •"
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> "This is not to say that probable cause can be made out by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause

exists without detailing any of the 'underlying circumstances' upon which that belief is based. See Aquilar v. Texas, *supra*. Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. However, *where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause*, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. Jones v. United States [362 U.S. 257], supra, at 270 (80 S.Ct. 725, 4 L.Ed.2d 697]." (emphasis added).

[8] The motions to suppress based upon the alleged insufficiency of the affidavits to support Judge Smith's determination of probable cause for the wiretap order are denied.

3. COMPLIANCE OF THE ORDER WITH THE STATUTE

This Court, having determined that 18 U.S.C., Section 2518 is constitutional and having also determined that Judge Smith had probable cause to issue the Intercept Order of January 24, 1970, must now decide whether that order complied with the requirements of the statute.

The determinations required by Section 2518(3) of Title 18 United States Code are set forth in the order of January 24, 1970, and, as heretofore pointed out, are amply supported by the factual circumstances showing probable cause.

The defendants claim, however, that the Intercept Order failed to comply with the requirements of the statute, particularly sub-sections 4(c), 4(e) and (5), and move that all evidence obtained as a result of the wiretap and all of the "fruits" of that interception be suppressed. Inasmuch as the requirements of sub-sections 4(a), (b) and (d) have not been challenged by the defendants the discussion will not deal with those sub-sections.

[9] I. The statute in sub-section 4(c) requires the Court

in its intercept order to specify "a particular description of the type of communications sought to be intercepted, and a statement of the particular offense to which it relates." It is the Government's contention that the order, if read as a whole, clearly so specifies. This Court agrees.

> Paragraph (a) of the Order states: "There is probable cause to believe that Alphonso H. Lee, • • • Bernis Lee Thurman, and others • • • are committing and are about to commit offenses set forth in section 2516 of Title 18, to wit: *the importation and transportation of narcotics in violation of section 174 of Title 21 of the United States Code*" (emphasis added).

This statement of a "particular offense" satisfies one of the requirements of sub-section 4(c).

Paragraph (b) of the Order continues with an additional finding that "[t]here is probable cause to believe that communications concerning that offense will be obtained through the interception of wire communications," and that "[i]n particular, those wire communications will concern the date and the manner in which narcotic drugs will be smuggled into the United States and the participants and the nature of the conspiracy involved therein and the illicit destination of these narcotic drugs in this jurisdiction." This finding satisfies the specific requirements of 4(c) that the order specify "the type of communication sought to be intercepted • • •."

The Order proceeds in paragraph (c) to state that "all normal investigative procedures have been used but none appears reasonably likely to succeed in obtaining *the above information.*" (emphasis added). The "information" referred to in paragraph (c) relates to the type of communications detailed in paragraph (b) and thus again cautions the surveilling agent as to the type of communications to be intercepted.

Finally, paragraph (d) of the Order finds "probable cause to believe that the telephone facilities at 1425 N Street, Northwest, Washington, D. C., carrying the telephone number 483-2948 is being used or is about to be used in connection with the commission of the *above described offenses* • • •." (emphasis added). This statement is again a clear reference to the offenses described in paragraph (a) of the order.

It is thus apparent that the order under consideration,

if read in its entirety, as it must be, does comply with the statutory provisions of 18 U.S.C. 2518(4) (c) by particularly describing the "type of communications sought to be intercepted" and by stating "the particular offense to which it relates."

[10] II. Section 4(e) of the statute requires the order to state "whether or not the interception shall automatically terminate when the described communication has been first obtained." This requirement is complied with in the "ordering" portion of the order which provides in pertinent part that the interception "must terminate upon attainment of the *authorized objectives,* or, in any event at the end of thirty (30) days from date." (emphasis supplied). The "authorized objectives" referred to relate to the seizure of telephone communications concerning the importation and transportation of narcotics and the conspiracy referred to in paragraphs (a) and (b) of the order.

[11, 12] III. The intercept order clearly complies with 18 U.S.C. § 2518(5), which requires a specification of the time during which the interception is authorized, by providing in the "Ordering" clause that:

> "This authorization to intercept wire communications shall be executed as soon as practicable after signing of the Order and shall be conducted in such a way as to minimize the interception of communications that are [not][1] otherwise subject to interception under Chapter 119 of Title 18 of United States Code, and must terminate upon attainment of the authorized objectives, or, in any event at the end of thirty (30) days[2] from date."

[1] There are two typographical errors in the Order which merit mentioning:

The word "[not]" was erroneously omitted from the Order. However, it was understood by the applicant and the agents that the interception was to be conducted so as to minimize the receipt of communications *not* otherwise subject to interception. If the surveilling agents disregarded the known intent of the Order the seizure would be illegal and the evidence seized subject to suppression. This issue is discussed in another section of this opinion.

[2] The order erroneously authorized a 30-day intercept while the application only requested a 20-day intercept. This was conceded to be a clerical error and an extension was applied for at the end of 19 days so no prejudice ensued because of the error.

It should also be noted that § 2518(3) gives the authorizing judge authority to modify a requested order. Thus Judge Smith could have extended the time period requested so long as it was still within the 30 day maximum period prescribed by the statute and did in fact extend the authorization for 11 days upon the expiration of 19 days.

Contrary to the contention of the defendants the statute does not require the Order to state *how* the agents are to minimize receipt of communications "not otherwise subject to interception"; nor does the 4th Amendment prescribe such a requirement. It is sufficient for the Order to state the requirement and direct the officer to carry out the mandate of that Order. Whether the surveilling agents in this case actually did conduct the intercept "in such a way as to minimize the interception of communications that are [not] otherwise subject to interception" is a separate question which will be discussed in another section of this memorandum.

IV. A basic requirement of 18 U.S.C. § 2518 is that a neutral and detached authority be interposed between the police and the public so as to comply with the 4th Amendment. The Order of January 24, 1970, in its final paragraph, allows for continued judicial supervision and control by that "neutral and detached authority" during the execution of the order by providing that:

> "Harold J. Sullivan shall provide the Court [Judge Smith] with a report detailing the progress of the interception and the nature of the communication intercepted on the 5th, 10th, 15th, 20th, and 25th day following the date of this Order."

It is concluded from the preceding analysis that all requirements of the statute, including 18 U.S.C. 2518(4) and (5) have been adequately incorporated in the Order of January 24, 1970 and it is thus the opinion of this Court that said order "tracks the statute" and is therefore valid.

4. COMPLIANCE WITH ORDER BY MONITORING OFFICERS

Having determined that the Order of January 24, 1970, complies with 18 U.S.C. § 2518 the Court must now consider and determine whether the surveilling agents complied with the requirements of that order.

The United States Supreme Court in Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967), was deeply concerned with the indiscriminate seizure of communications permitted by the New York permissive eavesdrop statute, New York Code Crim.Proc. § 813-a, and stated in this regard that:

"The statute's failure to describe with particularity the conversations sought gives the officer a roving commission to 'seize' any and all conversations."

• • • • • •

"During such a long and continuous (24 hour a day) period the conversations of any and all persons coming into the area covered by the device will be seized *indiscriminately* and without regard to their connection with the crime under investigation." 388 U.S. at 59, 87 S.Ct. at 1883 (emphasis added).

To cure this deficiency in the N. Y. statute, 28 U.S.C. 2518 provided for numerous requirements that were prescribed by *Katz* and *Berger*. In light of these requirements it was the opinion of this Court that 28 U.S.C. 2518 "tracked" *Katz* and *Berger* and was thus constitutional. (See Part 1 of Opinion, supra).

As the Government has contended "Title III of the Omnibus Crime Control and Safe Street Act of 1968 was an attempt among other things to structure a *limited system of wire surveillance* and electronic eavesdropping for law enforcement use • • •." (Gov't's memorandum at p. 3). (emphasis added). One of the limiting provisions of the statute is found in 18 U.S.C. 2518(5) which provides in pertinent part that:

"Every order • • • shall contain a provision that the authorization to intercept • • • shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception • • •."

This mandate was clearly set forth in the "Wherefore" clause of the January 24, 1970 order. (See Part 3 of opinion, *supra*). As provided by statute (28 U.S.C. 2518(4)(c) the Order also attempted to describe with particularly the type of communications sought to be intercepted. (See Part 3 of opinion, *supra*). It was the opinion of this Court that these limiting provisions satisfied the requirements of §§ 4(c) and (5) of the statute and thus made the order valid.

It is unquestionable that the intent of the order was clearly expressed. Agent Cooper, the supervising agent, testified that he "understood the order to restrict [the intercept] to conversations relating to narcotics" and that he "relayed the instructions to the agents who would be manning the taps." (Transcript at pp. 305-06). Yet in spite

of the order's unequivocal mandate the record reflects that virtually *all* conversations were overheard and recorded (transcript at p. 355) and that approximately 60% of the calls intercepted were completely unrelated to narcotics. Neither of these facts standing alone is conclusive but together they strongly indicate the indiscriminate use of wire surveillance that was proscribed by *Katz* and *Berger*.

The Government contends that all conversations had to be monitored in order to determine whether or not they were narcotic related. However, the record clearly depicts certain communications that could not possibly involve drugs. For example, the intercept transcript at page 47 shows a call from Riggs National Bank to Thurman seeking to verify a signature on a check; at pages 148-150 shows a conversation between Geneva and another female about a possible job opening and Geneva's qualifications for it; and at page 280 a call to the Weather Bureau and the response. It is common knowledge that when one calls for a weather report he will get a tape recorded response. These are clear cases where the intercept should have been cut off. However, the intercept was not cut off. The surveilling agents did not even attempt "lip service compliance" with the provision of the order and statutory mandate but rather completely disregarded it. The record is devoid of any attempt, no matter how slight, to minimize the interception of unauthorized calls. In fact when Agent Cooper was asked if he could point to "any discretion exercised by any agent at any time that resulted in • • • non-recordation • • •" He answered "I cannot, sir." (Transcript at p. 319).

The record indicates approximately six conversations between Geneva Jenkins and her mother. While each conversation was intercepted in its entirety, there was never any indication that Geneva's mother was involved in the alleged conspiracy and none of the conversations were narcotic related. Geneva herself was mentioned in the affidavit only as the subscriber to telephone number 483-2948. This Court is willing to accept the proposition that it may be reasonable to monitor an entire conversation between two known conspirators even if that conversation turns out to be innocent. 28 U.S.C. § 2518(5) provides for this by demanding only that there be an attempt to "*minimize* the interception of communications not otherwise subject to interception • • •." (emphasis added). But there comes a time when an officer should reasonably assume that a par-

ticular conversation does not involve drugs. The conversations between Geneva and her mother serve as the most blatant examples of this. While there are other instances in which the Court feels that the tap should have been cut off, it will suffice to reiterate that virtually 100 per cent of all calls in each 24 hour day were monitored and that 60 per cent of the calls intercepted were not related to narcotics and not otherwise subject to interception. The Government itself has persuasively argued that an order should be read in its entirety and that "[i]*t is presumed, at the least, that the judge intended the whole of the order and every part of it to be significant and effective.*" (emphasis added). (Government's memo at 15). If this Court were to allow the Government agents to indiscriminately intercept every conversation made and to continue monitoring such calls when it becomes clear that they are not related to the "authorized objectives" of the wiretap and in violation of the limiting provisions of the order such order would become meaningless verbiage and the protections to the right of privacy outlined in *Berger* and *Katz* would be illusory.

The Government argues that the indiscriminate listening by the monitoring agents was in effect approved by Judge Smith because reports were made to him every five days during the period of the intercept and he did not require any change in the manner in which the interception was being conducted but, as a matter of fact, extended the authorization for an additional period. This Court has examined the 5-day reports to Judge Smith and notes that those reports do not reveal that the agents were failing to "minimize the interception of communications that [were not] otherwise subject to interception" as required by his order of January 24, 1970. In the main, they simply report the total number of communications recorded in each 24-hour period and the number of such calls that were narcotic related. Some of the reports included a summary of what was said in some of the narcotic related conversations and information gained relating to the authorized objective, but none of them revealed that the agents were listening to and recording in full and indiscriminately *all* conversations passing through the subject telephone.

[13] The Government argues also that in the investigation of an ongoing narcotics conspiracy such as is involved in this case, it is necessary to intercept and monitor from beginning to end all communications passing through the

tapped telephone because narcotics related transactions are conducted through code words that are peculiar to such transactions and conversations that may sound innocuous in the beginning may end up on a narcotic related subject employing such code words. This Court recognizes the difficulty that monitoring agents may have in manning wiretaps in cases of this kind. Nevertheless, that difficulty cannot authorize indiscriminate listening or permit such agents to totally disregard an order of the authorizing judge to conduct the interception "in such a way as to minimize the interception of communications that are not otherwise subject to interception."

[14] It is thus the opinion of this Court that the surveilling agents failed to comply with a central mandate of the Order of January 24, 1970—i.e. to "minimize the interception of communications not otherwise subject to interception"—and, therefore, the motions to suppress should be and are granted, and all intercepted telephone communications, tape recordings, transcriptions and evidence obtained either directly or indirectly as a result of the intercept authorized by the Order of January 24, 1970, are suppressed.

This granting of this motion to suppress does not necessarily end the prosecution of this case. Under District of Columbia Code, Section 23-104, as amended by the District of Columbia Court Reform and Criminal Procedure Act of 1970, the United States may have an expedited appeal. The results of such appeal may provide guidance for this Court in any future proceedings in this case; for other judges who hereafter may be faced with similar problems and to enforcement officers in connection with future interceptions authorized pursuant to the statute for similar investigations.*

5. MOTIONS FOR PRODUCTION AND IDENTITY OF INFORMANT TO SUPPRESS PHYSICAL EVIDENCE, FOR SEVERANCE OF DEFENDANTS AND COUNTS, FOR LEAVE TO FILE SUPPLEMENTAL SEARCH WARRANT INVENTORY, AND TO CONSOLIDATE

The remaining motions not disposed of at the hearing or in this memorandum are disposed of as follows:

* If the Court of Appeals affirms the ruling of this Court, many weeks of trial may be averted.

Defendants' Motion For Production and Identity of the informant is denied. McCray v. Illinois, 386 U.S. 300, 311, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967); Roviaro v. United States, 353 U.S. 53, 59, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957).

The granting of the motion to suppress for failure of the monitoring agents to comply with the order has the effect of disposing of the motions of the defendants to suppress the physical evidence obtained or seized as the result of the searches conducted in the execution of search warrants or incident to arrests in the prosecution of this case. All such motions are granted on the ground the warrants themselves were issued as a result of illegally obtained evidence and the evidence seized are "fruits of the poisonous tree." Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); Nardone v. United States, 308 U.S. 338, 60 S.Ct 266, 84 L.Ed. 307 (1939); Silverthorne v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319.

All motions for severance of counts and defendants are denied, no undue prejudice having been shown. Rules 14 and 8(b), Federal Rules of Criminal Procedure.

The motion of the United States for leave to file supplemental search warrant inventory is granted. Nordelli v. United States, 9th Cir., 24 F.2d 665; United States v. Greene, D.C., 141 F. Supp. 856.

The motion of the United States to consolidate Criminal Cases Nos. 1088-70 and 1089-70 is granted. Rule 13, Federal Rules of Criminal Procedure.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Title omitted in printing)

Washington, D.C.

Transcript of Hearing—Friday, June 25, 1971

The above-entitled cause came on for motion for reconsideration before THE HONORABLE JOSEPH C. WADDY, United States District Judge, commencing at 1:45 p.m.

[44] MR. KELLOGG: Nothing from the United States, Your Honor.

THE COURT: Very well.

THE COURT: The Court has considered the submission of the Government and the counter-submissions of the defendants on this motion to reconsider; and the Court agrees with counsel for the defendants that, apparently, the Government misses the point in its argument as to what this Court was doing.

There was an order which said that steps should be taken to minimize the interception of communications not otherwise subject to interception. There was uncontradicted evidence that was before this Court that no steps were taken to minimize the interception of communications that were not otherwise subject to interception.

The analysis that the Government now makes or attempts to make might have a more persuasive power if the evidence would show that the agents attempted to minimize the interception but ran into difficulty because of the nature of the case and, therefore, some of the messages and some of the communications were ambiguous and they continued to listen.

That is a different situation than where there has been an attempt to follow the order.

But here the evidence, as I say, is contradicted that absolutely no attempt was made to minimize the interception of communications not otherwise subject to interception.

[45] As to the question of standing, the Court agrees also with counsel for the defendants. And the Court take the position that in view of the fact that no attempt was made to minimize the interception of communications that should not have been intercepted that there was a pointblank viola-

tion of the order granted by Judge Smith; and that conversations seized from persons other than Miss Jenkins and Mr. Thurman are likewise suppressible as being fruits of a poisonous tree.

And the Court feels that this is in keeping with the holdings of Jones and Alderman (phonetically). In Alderman (phonetically) the Court says that "such violation would occur if the United States unlawfully overheard conversations of petitioner himself." And here were conversations of the defendants themselves.

And proceeding further in the same opinion, the Court says that "the Court has characteristically applied the same rules where unauthorized electronic surveillance is carried out by physical invasion of premises."

This much the dissent frankly concedes when it is talking about consent.

Then it proceeds, "Like physical evidence which might be seized, overheard conversations are fruit of an illegal entry and are inadmissible in evidence."

The motion of the Government to reconsider is denied.

[Thereupon, the above-entitled matter was concluded at 3:33 p.m.]

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UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT.

UNITED STATES of America,
Appellant,

v.

Frank R. SCOTT et al.

UNITED STATES of America,
Appellant,

v.

Bernis L. THURMON et al.
Nos. 71-1702, 71-1703.

Argued Dec. 13, 1972.

Decided June 27, 1974.

Before McGOWAN, MacKINNON and ROBB, Circuit Judges.

McGOWAN, Circuit Judge:

The Government appeals a District Court determination that (1) law enforcement officials conducting a judicially authorized wiretap failed to minimize, to the degree required by the statute, interceptions of non-narcotics-related conversations and (2) all evidence derived therefrom should be suppressed. United States v. Scott, 331 F.Supp. 233 (D.D.C. 1970). We deferred decision pending action by this court on another case involving common issues, including that of minimization. United States v. James, 161 U.S.App. D.C. 88, 494 F.2d 1007 (1974). We conclude that the standards for measuring minimizations employed by the District Court are at variance with those subsequently announced and thoroughly discussed in *James*. Accordingly, we remand for reconsideration in light of that opinion and the additional comments contained herein.

I

Pursuant to the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, officials of the Federal Bureau of Narcotics and Dangerous Drugs and the Metropolitan Police Department applied for judicial authorization to intercept wire

communications of members of a narcotics conspiracy who were using a telephone listed to Geneva Jenkins.[1] The District Court granted authorization on January 24, 1970, empowering agents to intercept the "wire communications of Alphonso H. Lee, Burnis Lee Thurmon, and other persons as may make use of the facilities hereinbefore described," and commanding them to minimize interceptions of conversations not subject to interception under Title III.

On that same day the interception began. Officials subsequently sought and obtained authorization to intercept narcotics-related conversations conducted over two other telephone numbers,[2] and later obtained an extension of the original authorization.[3] On February 24, 1970, all of the interceptions terminated, and search and arrest warrants were executed that led to the arrest of twenty-two persons and the seizure of considerable quantities of narcotics.

Following indictment, another district judge ordered comprehensive discovery and thereafter conducted an extensive series of hearings on multiple defense motions. The court concluded that the agents conducting the interception of

[1] The application and judicial authorization identified the subscriber of the telephone number as Geneva Thornton. However, the District Court opinion indicates that the name Thornton was an alias, and that the subscriber's real name was Geneva Jenkins. She was indicted under that name. United States v. Scott, 331 F.Supp. 233, 236 (D.D.C.1970). In this opinion, we will refer to her as Geneva Jenkins, and to the telephone number on which the authorization was granted as the Jenkins telephone.

[2] The District Court's opinion in terms dealt only with the question of the agent's efforts to minimize unauthorized interceptions in the Jenkins wiretap. Its suppression order excluded all evidence derived from this initial interception, and "evidence obtained either directly or indirectly as a result of the intercept authorized by the Order of January 24, 1970." United States v. Scott, 331 F. Supp. 233, 248 (D.D.C.1970). While it appears that at least some information obtained from the Jenkins wiretap is reflected in the application and affidavit supporting the interceptions on the other telephone numbers, *see* JA at 28, 30–41, there was also a substantial amount of independent material contained in those documents. In these circumstances we are unable to say with certainty whether the District Court thought those taps to be fatally tainted by what it considered to be the invalid Jenkins tap. If on remand the District Court should persist in this view of the Jenkins tap, it will presumably be required to determine whether the other interceptions were tainted to an unacceptable degree by information obtained from that tap. *See* Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

[3] Although the application for the initial interception requested authorization for a twenty day wiretap, the court order granted permission for thirty days. However, agents sought extension of the initial authorization after twenty days, and that extension was granted. Appellees have not pointed to any particular harm resulting from the court's oversight, and we have found none.

conversations over the Jenkins phone had failed to comply with the minimization mandate, and ordered suppression of conversations intercepted in that wiretap and all other evidence derived therefrom. The Government, after failing in its attempt to obtain reconsideration of the court's order, exercised its statutory right of appeal. 18 U.S.C. § 2518 (10)(b).

Minimization was but one of a number of issues urged upon the District Court during the extensive pretrial hearings. The defendants advanced individual contentions, as well as numerous common questions pertaining to the constitutionality of Title III and to the implementation of the statutory requirements in this case. Moreover, the court was at the time essentially writing on a clean slate. Few appellate decisions existed to offer guidance in the resolution of the many complex constitutional and statutory problems underlying Title III, and this court had not as yet spoken to those questions at all. *James* now teaches that the District Court properly rejected appellees' constitutional challenge to the provisions of Title III. United States v. James, 161 U.S.App.D.C. 88, 494 F.2d 1007, 1020 (1974). Moreover, we have examined the affidavit filed in support of the application for authorization to intercept conversations on the Jenkins phone, and we feel that the court properly rejected all challenges to its sufficiency. *See id.* at 1021. Finally, we concur in the court's rejection of appellees' contentions that the authorizing order insufficiently particularized the conversations that could be intercepted.

II

[1] The Government asserts that the court erred in permitting each "aggrieved person," in the language of the statute, to raise a minimization objection based on the interception of conversations in which he did not participate, insisting that this enables appellees to assert the privacy interests of others in violation of long established principles of Fourth Amendment law. *See generally* Brown v. United States, 411 U.S. 223, 230 (1973), *and cases cited therein.* Pointing out that all of the conversations cited by the court involve either Geneva Jenkins or appellee Bernis Thurmon and third parties, the Government maintains that only Geneva Jenkins and appellee Thurmon have standing to suppress intercepted conversations.

The Congressional definition of "aggrieved person" was designed "to reflect-existing law." S.Rep.No. 90-1097, 90th Cong., 2d Sess., 91 (1968). *See also* Alderman v. United States, 394 U.S. 165, 175 n. 9, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969); United States v. King, 478 F.2d 494, 506-507 (9th Cir. 1973); United States v. Doe, 451 F.2d 466, 469 (1st Cir. 1971). Moreover, Congress understood that this would serve to limit the statutory remedy so as not to "press the scope of the suppression rule beyond the present search and seizure law." S.Rep.No. 90-1097, *supra*, at 96.

[2] There appears to be no question that each of the appellees in this case is an "aggrieved person" within the meaning of the statute.[4] As such, each is protected by the stringent safeguards of Title III, including the requirement that agents minimize interceptions of conversations that they are not authorized to intercept. Each aggrieved person is entitled to question whether the statutory minimization requirement has been satisfied and, on proving that it has not, to move to suppress a communication on the ground that "the interception was not made in conformity with the order of authorization or approval." 18 U.S.C. § 2518(10)(a)(iii). The question presented by the Government's challenge is really whether some of the appellees can introduce evidence based on conversations in which they did not participate in order to attempt to demonstrate that the intercepted conversations to which they were a party were not, in the statutory phrase, seized "in conformity with the order of authorization."[5]

[4] Section 2510(11) defines an "aggrieved person" to be any person "who was a party to any intercepted wire or oral communication" or a person "against whom the interception was directed." 18 U.S.C. § 2510(11). Each appellee claims to have been a party to an intercepted conversation, and the Government does not contest this claim. Section 2518, in turn, states that aggrieved persons "may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval."

Id. § 2518(1)(a). *See* United States v. Giordano, *infra*, 469 F.2d 522 (4th Cir. 1972).

[5] The Government's argument on standing is correct insofar as it relates to the question of which conversations an individual aggrieved person might suppress upon proof that the monitoring agents failed adequately to minimize. As Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969), indicates, the prohibition against assertion of another's rights normally would preclude an aggrieved person from suppressing a conversation in which he did not participate. *See* United States v. Poeta, 455 F.2d 117, 122 (2d Cir. 1972).

On this appeal the Government argued vigorously that, even assuming a breach of the statutory minimization requirement, it was error for the District Court to exclude all of the intercepted conversations, including those clearly related to narcotics. Since the question of the appropriate remedy for such breach does not arise until the breach itself is established, we do not, in view of the disposition we make of this appeal, find it necessary to address that question.

[6] Although the opinion does not so indicate, the transcript of the hearings reveals that the Government unsuccessfully pressed this argument upon the District Court.

[7] We do not mean to imply that in all cases the District Court should allow each aggrieved person access to the totality of the intercepted conversations in order to prove a minimization challenge. Title III makes the authorizing judge the custodian of the intercepted conversations. 18 U.S.C. § 2518(8)(a), (d). Additionally, Section 2518(10) states that the judge, upon the filing of a motion to suppress, "may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice." There may be cases in which the district judge determines that he can confidently rule on the minimization question without permitting complete access to all of the intercepted conversations.

[3] Any inquiry into possible noncompliance with the minimization requirement is, by its very nature, one that calls for an examination of the totality of the monitoring agents' conduct during the duration of the authorized interception. Fragmenting the minimization inquiry in the manner suggested by the Government would force the court to adopt an unrealistically narrow view of the issue, thus making any assessment of the overall reasonableness of the agents' conduct a highly artificial exercise. The District Court properly recognized this, and rejected the Government's argument.[6] The court also properly recognized the necessity of assessing the totality of the agents' conduct, and indeed considered the cited conversations only as examples of their actions. *See* Scott, *supra*, 331 F.Supp. p. 2, at 247. We find no error in this regard.[7]

[4, 5] Examination of the District Court's resolution of the merits discloses, however, that the court did apply an improper standard in assessing the agents' alleged noncompliance with the minimization requirement. As *James* and other cases make clear, any minimization determination requires an assessment of the reasonableness of the agents' efforts in light of the purpose of the wiretap and the information available to them at the time of interception. *See*

also United States v. Bynum, 360 F.Supp. 400 (S.D.N.Y.), aff'd, 485 F.2d 490 (2d Cir. 1973), vacated on other grounds 417 U.S. 903, 94 S.Ct. 2598, 41 L.Ed.2d 209 (1974); United States v. Focarile, 340 F.Supp. 1033 (D.Md.), aff'd sub nom. United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), aff'd, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974).

It appears that the trial court's conclusion that the agents made no attempt to minimize stemmed in large part from its conclusions that they failed to succeed. The court relied heavily upon the fact that some sixty percent of the intercepted conversations appeared to be unrelated to narcotics transactions. This, together with the fact that the agents intercepted all of the conversations conducted during this period of authorization, in the opinion of the District Court, "strongly indicate[d] the indiscriminate use of wire surveillance that was proscribed by *Katz* [Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576] and *Berger* [Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040]." *Scott, supra,* 417 U.S. 903, 94 S.Ct. 2598, 41 L.Ed.2d 209, p. 2, at 247. The court purported to find confirmation of this initial impression in its examination of certain conversations which, in its opinion, clearly should not have been intercepted.

[6] This court's intervening opinion in *James* indicates that an assessment of the reasonableness of agents' attempts to minimize must be judged on a considerably more particularized basis. For example, a substantial number of the intercepted conversations that cannot be classified as narcotics-related appear to have been either very short in duration or extremely ambiguous in nature, or both. Interception of those conversations cannot be considered unreasonable, for the agents could not have determined whether they were innocent prior to their termination. *See* United States v. Bynum, 485 F.2d 490, 500 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903, 94 S.Ct. 2598, 41 L.Ed.2d 209 (1974). And, if the Government's characterization of the number of intercepted conversations of this type proves substantially correct, it would appear that the District Court's determination that sixty percent of the intercepted calls were unrelated to narcotics substantially overstates the case for noncompliance with the order to minimize. Likewise, the cited conversations between appellee Geneva Jenkins and her mother must be examined more carefully.

While all of the conversations may appear in retrospect to have been innocent, that does not necessarily indicate that each interception was unreasonable. The conduct of the agents must be assessed in light of the information available to them at the time. If the Government's assertion that agents had reasonable cause to suspect the mother's knowledge of the narcotics conspiracy proves correct, interception of those conversations would not be unreasonable, at least until such time as the initial suspicion should have been dissipated.

III

While examination of the District Court's opinion persuades us that the court applied improper standards in resolving the minimization question, we cannot with equal certainty determine what the proper resolution of the issue should be. Many of the underlying facts essential to an assessment of the reasonableness of the agents' conduct have not been established. Much of the Government's argument in this court is based on an analysis prepared by it of the intercepted calls, including its resulting characterization of the information available to the agents at the time of the particular interceptions. This comprehensive analysis was not made available to the court prior to the motion for reconsideration of its suppression order, and the transcript of the hearing on that motion indicates that it was not carefully examined at that time.

The call analysis, while not technically new evidence, may suffer some of the same infirmities. It may, for example, contain errors of characterization or other factual inaccuracies that can best be identified and corrected in adversarial proceedings. Likewise, the Government's characterization of the nature of information available to the intercepting agents should be subject to appellees' scrutiny and challenge. Only after the court is satisfied that it has a complete and accurate picture of the agents' actions can it make a meaningful assessment of the reasonableness of their conduct.

The District Court, upon remand, should accept the call analysis and any other evidence that might appear to be of assistance in the resolution of this complicated minimization question. And, after assuring itself of the validity of the evidentiary offerings, it should again assess the reason-

ableness of the agents' conduct in light of *James* and the comments contained herein.

The suppression order is vacated without prejudice, and the case is remanded to the District Court for re-examination of the minimization issue in the light of *James* and for further proceedings consistent herewith.

It is so ordered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA vs. FRANK R. SCOTT, et al. and UNITED STATES OF AMERICA vs. BERNIS L. THURMON, et al.	Criminal No. 1088-70 Filed Nov. 12, 1974 James F. Davey, Clerk Criminal No. 1089-70

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This cause is before the Court on remand from the United States Court of Appeals for the District of Columbia Circuit, directing this Court to reexamine the minimization issue in the light of *James* (*United States* v. *James*, 494 F.2d 1007 (1974)) and for further proceedings consistent with its order of remand. It directed the Court to ". . . accept the 'call analysis' and any other evidence that might appear to be of assistance in the resolution of this complicated minimization question. And, after assuring itself of the validity of the evidentiary offerings, it should again assess the reasonableness of the agents' conduct in light of *James* and the comments contained therein."

In compliance with the Remand Order of the Court of Appeals this Court held evidentiary hearings on October 15, 16, 17 and 18. It received into evidence the "call analysis" made by former Assistant U. S. Attorney Phillip Kellogg, the daily reports of the listening agents as compiled by the supervising agent; the reports of the supervising agent to Harold J. Sullivan, the Assistant U. S. Attorney in charge of the investigation, and the periodic reports of Mr. Sullivan to Judge Smith. Oral testimony was given by Special Agent Glennon L. Cooper, who was in charge of the investigation, by Mr. Kellogg, who prepared the "call analysis" and others. The Court also reexamined the entire transcript of the hearings conducted in April, 1971, and heard arguments of counsel.

Based upon the foregoing reexamination this Court finds:

1. That Title 18, Section 2518(5) of the United States Code requires that

> "(E)very order and extension thereof shall contain a provision that the authorization to intercept . . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter. . .".

2. That the orders and extension of Judge Smith authorizing the interceptions in this case contained the direction to the agents manning the tap that was required by Title 18, Section 2518(5).

3. That Special Agent Cooper and the monitoring agents knew that the Statute and the authorization required such minimization.

4. That the monitoring agents made no attempt to comply with the minimization order of the Court but listened to and recorded all calls over the Jenkins telephone. They showed no regard for the right of privacy and did nothing to avoid unnecessary intrusion.

5. That the telephones for which the interceptions were authorized by Judge Smith were located in residences, and were not the type of "business" phone as was used in *James*.

6. That the monitoring agents made daily reports of all calls intercepted and classified them as to whether they were narcotic related or not narcotic related.

7. That these daily reports and classifications were turned over to Mr. Sullivan and Mr. Sullivan presented the information and classifications contained in these reports to Judge Smith without modification.

8. That the intercept revealed that the criminal operation under investigation was of lesser dimension than was originally anticipated.

9. That according to the reports and classifications of the monitoring agents that were ultimately submitted to Judge Smith 40% of the intercepted calls were narcotic related and 60% were not narcotic related. Judge Smith was never informed that the agents were making no attempt to minimize.

10. That at the hearings in April, 1971, Special Agent Glennon L. Cooper testified under oath that the telephone calls fell into the classifications mentioned in Paragraph 9 above. He also testified that he and the agents working under him knew of the minimization requirement but made no attempt to comply therewith. At the hearing on remand Agent Cooper repeated that testimony as follows:

BY THE COURT:

Q. Agent Cooper, at a hearing—at a prior hearing, you have testified that you were the supervising agent of the intercept which was placed upon the N Street number and the other two numbers, am I correct?

A. That is correct, Your Honor.

Q. And also that there were times when you, yourself, did the listening?

A. That's correct.

Q. The question I wish to ask you is this, whether at any time during the course of the wiretap—of the intercept, what if any steps were taken by you or any agent under you to minimize the listening?

A. Well, as I believe I mentioned before, I would have to say that the only effective steps taken by us to curtain the reception of conversations was in that instance where the line was connected to—misconnected from the correct line and connected to an improper line. We discontinued at that time.

Q. Do I understand from you then that the only time that you considered minimization was when you found that you had been connected with a wrong number?

A. That is correct, Your Honor.

11. After hearing testimony of Agent Cooper in April, 1971, after the Court had entered an order suppressing the evidence gathered by reason of the admitted failure to even attempt to comply with the Statute and the minimization order, the Assistant U. S. Attorney then in charge of the case made the "call analysis" and filed a motion to reconsider.

12. The "call analysis" was made by Mr. Kellogg in his capacity as an advocate without consultation with any federal narcotics agent and the categories were not shown to, looked at or validated by any such agent as "actual and realistic categories for agents to use in manning a wiretap."

Mr. Kellogg described the "call analysis" as ". . . purely and simply an after-the-fact analysis, designed to provide the Court with a means of factually analyzing the conduct of the agents. It was not in an effort to *infer, or assert that the agents followed these relatively sophisticated delineations in the course of the intercept. They did no*[t] insofar as I understand." Tr. Hearing on Remand, p. 436. (Emphasis supplied).

12a.* The "call analysis" conflicts with the reports and characterizations of the intercepted calls as made and determined by the monitoring agents whose conduct is controlling in this case.

13. An examination of the totality of the conduct of the monitoring agents in this case during the duration of the authorized interception reveals a knowing and purposeful failure to comply with or even attempt to comply with the minimization requirements of the statute and the order of authorization.

14. During the period of the intercepts there were conversations between persons at the Jenkins intercept and others at the Linnean Avenue intercepts. On occasion these communications revealed information and set in motion other conduct and types of surveillance that would not otherwise have been known or undertaken by the investigators.

CONCLUSIONS OF LAW AND ORDER

1. The Statute in this case imposes an absolute ban on electronic surveillance except under circumstances authorized by specific procedures which are not mere technical steps. *United States* v. *Giordano*, 469 F.2d 522, *affirmed*, 94 S. Ct. 1820, 40 L. Ed. 2d 341 (May 13, 1974).

2. Title 18, Section 2518(10)(a)(iii) provides for the suppression of ". . . the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that— . . . that the interception was not made in conformity with the order of authorization or approval."

3. The "call analysis" in this case is an after-the-fact non-validated presentation of counsel for the Government and

* Since there appear to be two paragraphs labelled "12," the second of the two will be referred to as "12a."

does not and was not intended to establish that the monitoring agents complied with the minimization statute and order.

4. The admitted knowing and purposeful failure by the monitoring agents to comply with the minimization order was unreasonable. Such conduct would be unreasonable even if every intercepted call were narcotic-related. The validity of a search is not to be determined by what is found. *Byars* v. *United States*, 273 U.S. 28, 29; *United States* v. *Di Re*, 332 U.S. 581. While the nature of the investigation may warrant closer listening than in some other type of case it does not warrant a total disregard of the statutory requirement and excuse the monitors from attempting to comply with the Statute and order of the Court. Failure to comply with the Statute and order of the Court renders any evidence obtained by such failure suppressible. *Sabbath* v. *United States*, 391 U.S. 585.

5. Inasmuch as the conduct of the monitoring agents was unreasonable the intercepted telephone communications, tape recordings, transcriptions and evidence obtained either directly or indirectly as a result of the intercept authorized by the Order of January 24, 1970, including communications between the Jenkins' telephone and the two Lee telephones and all surveillance and conduct emanating from said communications should be and they hereby are suppressed.

JOSEPH C. WADDY
United States District Judge

Date: November 12, 1974

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES of America,
Appellant,

v.

Frank Ricardo SCOTT, a/k/a
"Reds," et al.

UNITED STATES of America,
Appellant,

v.

Bernis Lee THURMON, a/k/a
Benjamin Thornton, et al.

Nos. 74-2097, 74-2098.

Argued April 23, 1975.

Decided July 25, 1975.

Opinion for the court filed by Circuit Judge MacKINNON.

MacKINNON, *Circuit Judge*:

The Government appeals from an order of the District Court suppressing all evidence derived from judicially authorized wiretaps because of a failure to observe the statutory requirement for minimization of the interception of telephone conversations.[1] The order under review was entered following a remand by this court reversing an earlier

[1] Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510, 2520, makes the following provision for minimization of intereceptions:

> Every order and extension thereof shall contain a provision that the authorization to intercept . . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, . . .

18 U.S.C. § 2518(5) (1970).

order of the District Court which had suppressed the same evidence on identical grounds. *United States* v. *Scott*, 164 U.S.App.D.C. , 504 F.2d 194 (1974). We hold that the District Court failed to correctly apply the standards set forth in our earlier remand and therefore a reversal of the suppression order is again necessary. Because of the extended period of time which has elapsed since the commission of the offenses in question, we have undertaken a review of the intercepted conversations rather than remanding for additional consideration by the trial court. This study convinces us that suppression of the evidence seized through the wiretaps is not appropriate in this case and the District Court accordingly should bring appellants to trial as soon as possible.

I

The material facts occurring prior to the initial remand are set forth in this court's opinion in *United States* v. *Scott, supra.* The decision of that appeal was held in abeyance pending issuance of the opinion in *United States* v. *James*,[2] wherein this court established standards for assessing compliance with the minimization requirement. *James* identified four factors which determine the degree of minimization required in a given case: (1) scope of the criminal enterprise under investigation; (2) location and operation of the subject telephone; (3) Government expectation of the content of the calls; and (4) judicial supervision by the authorizing judge. 494 F.2d at 1019-21.

After *James* issued, we determined that the District Court had applied an improper standard in reaching its decision to suppress the wiretap evidence in the instant case:

> As *James* and other cases make clear, any minimization determination requires an assessment of the reasonableness of the agents' efforts in light of the purpose of the wiretap and the information available to them at the time of interception. . . .
>
> It appears that the trial court's conclusion that the agents made no attempt to minimize stemmed in large part from its conclusions that they failed to succeed. The court relied heavily upon the fact that some sixty

[2] 161 U.S.App.D.C. 88, 494 F.2d 1007, *cert. denied*, 419 U.S. 1020, 95 S.Ct. 495, 42 L.Ed.2d 294 (1974).

> percent of the intercepted conversations appeared to be unrelated to narcotics transactions. . . .
>
> This court's intervening opinion in *James* indicates that an assessment of the reasonableness of agents' attempts to minimize must be judged on a considerably more particularized basis.

504 F.2d at 198. However, since we concluded that the record did not contain all the facts necessary for an assessment of the reasonableness of the agents' conduct, the case was remanded with the following directions:

> The District Court, upon remand, should accept the call analysis and any other evidence that might appear to be of assistance in the resolution of this complicated minimization question. And, after assuring itself of the validity of the evidentiary offerings, it should again assess the reasonableness of the agents' conduct in light of *James* and the comments contained herein.

504 F.2d at 199.

Following our remand, the District Court held four days of evidentiary hearings, received into evidence the Government's "Call Analysis" [3] and the various reports made dur-

[3] The "Call Analysis" is a document prepared by the Assistant U.S. Attorney in charge of the case after the District Court had entered its original order suppressing the evidence seized in the wiretaps. It divides the intercepted conversations into seven categories, producing the following results:

Category	Number of Conversations	Percentage of Total Interceptions
NS—Communications which in substance relate to the narcotics enterprise.	126	32.8
NP—Communications which relate to the narcotics enterprise in part.	7	1.8
ME—Communications not concerned with the narcotics enterprise but nonetheless of important evidentiary value.	21	5.4
A—Communications so ambiguous that their purpose cannot be determined.	142	36.9
R—Communications consisting totally of a recorded message.	27	7.0
UNRE—Communications which are unrelated to the narcotics enterprise but which were intercepted with a reasonable expectation of related material.	55	14.3
UN—Communications which are unrelated to the narcotics enterprise and which were intercepted with no reasonable expectation of related material.	6	1.56
Total Interceptions:	384	

> ing the course of the intercept, and heard testimony by the Special Agent in charge of the investigation and the former Assistant U.S. Attorney who had prepared the Call Analysis. Based on this evidence, the court concluded that the Call Analysis is "an after-the-fact non-validated presentation of counsel for the Government" [4] and therefore rejected it in favor of the original characterization by the intercepting agents that 40% of the intercepted calls were narcotic related and 60% were not narcotic related. With respect to the *James* criteria, the court found that the taps were placed on residential rather than "business" telephones, that the interceptions revealed a criminal operation of lesser scope than originally anticipated, and that the authorizing judge was never informed that the agents were making no attempt to minimize.[5] Rather than seeking to identify specific conversations which should not have been intercepted, the court found that the admitted knowing and intentional failure by the monitoring agents to terminate the interception of any conversation rendered their conduct unreasonable and thus suppression of all evidence derived from the wiretaps was necessary.

II

[1, 2] Before analyzing the most recent suppression order, a few general observations about the meaning of the minimization requirement are appropriate. The statute provides that all wiretaps "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception." [6] Since interceptions need only be "minimized," Congress quite clearly contemplated that some irrelevant conversations will inevitably be intercepted. To hold that the monitoring agents must make a determination whether to minimize in the course of each individual conversation would be an open invitation to criminals to escape detection by the simple device of devoting the initial part of each call to non-criminal matters. Thus the only feasible approach to minimization is the gradual development, during the execution of a particular wiretap order, of categories of calls which most likely will not produce information relevant to the investigation. Once the monitoring agents have sufficient data to conclude that a particular type of conversation is unrelated to the criminal

[4] Conclusions of Law, ¶ 3.

[5] Findings of Fact, ¶¶ 5, 8, and 9, respectively.

[6] 18 U.S.C. § 2518(5) (1970).

investigation, the minimization requirement obliges them to avoid intercepting future conversations as soon as they can determine that it falls within that category. Until such categories become reasonably apparent, however, interception of all calls will be justified under the wiretap authorization.[7] In addition, even after such a category is developed, it will likely still be necessary to intercept a small portion of each call to determine whether it falls into the category being minimized.[8]

Where neither party to the conversation is believed to be a participant in the criminal activity under investigation, the decision to minimize interception of their calls should be easily reached. Where at least one party is a suspected participant in the criminal conduct, the agents will need to amass considerably more data before they can reasonably conclude that further interception will produce no relevant information. It is of course possible that conversations involving suspected conspirators will deal exclusively with topics other than the conspiracy, but it is unlikely that such conversations will be readily subject to minimization.

[7] In United States v. Quintana, 508 F.2d 867 (7th Cir. 1975), the court gave the following description of the procedures to be used by the monitoring agents:

> Where the government does not at the outset have reason to believe that any identifiable group of calls will be innocent, then it may be reasonable to monitor all calls for some time. If the agents learn from this initial total interception that there is a pattern of innocent conversations, then they should cease eavesdropping on that group during the remainder of the tap. *Cf.* United States v. Focarile, 340 F.Supp. 1033 (D.Md.), aff'd sub nom. United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), rev'd on other grounds, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974).
>
> To state that agents must seek a method of separating innocent from incriminating conversations is not to say that such a pattern will always be identifiable. The problem is that "... it is often impossible to determine that a particular telephone conversation would be irrelevant and harmless until it has been terminated.
>
> . . . . . .
>
> It is all well and good to say, after the fact, that certain conversations were irrelevant and should have been terminated. However, the monitoring agents are not gifted with prescience and cannot be expected to know in advance what direction the conversation will take."

United States v. Cox, 462 F.2d 1293, 1301 (8th Cir. 1972), quoting United States v. LaGorga, 336 F.Supp. 190, 196 (W.D.Pa. 1971).
508 F.2d at 874.

[8] It is . . . obvious that no electronic surveillance can be so conducted that innocent conversation can be totally eliminated. Before a determination of innocence can be made there must be some degree of eavesdropping.
United States v. Bynum, 485 F.2d 490, 500 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903, 94 S.Ct. 2598, 41 L.Ed.2d 209 (1974).

III

As we stated in *James*, the standard of minimization is reasonableness which must be determined from the facts of each case:

> The congressional reports accompanying the wiretap statute and decisions interpreting 18 U.S.C. § 2518(5) make it clear that the minimization standard, like the standards traditionally applied to the determination of probable cause, is one of reasonableness which must be ascertained from the facts of a given case. "What is important is that the facts in the application on a case-by-case basis justify the period of time of the surveillance." S.Rep.No. 1097, 90th Cong., 2d Sess. 101, U.S. Code Cong. & Admin.News 1968, p. 2190 (1968).

494 F.2d at 1018.

Throughout these proceedings the Government has conceded that its agents did not minimize the interception of any conversations.[9] Thus its position has of necessity been that interception of all 384 conversations was reasonable under the facts of this case. The District Court, however, found that the failure to attempt minimization was itself proof that the interceptions were unreasonable:

> The admitted knowing and purposeful failure by the monitoring agents to comply with the minimization order was unreasonable. Such conduct would be unreasonable even if every intercepted call were narcotic related.

Conclusions of Law, ¶ 4.

[3, 4] Since the extent of minimization required in a particular case can only be determined during the course of the wiretap,[10] the District Court was clearly in error in

[9] It was initially determined that calls involving privileged matters, *i.e.* calls between doctor and patient, attorney and client, and priest and penitent, would not be intercepted. Oct. 1974 Tr. 93. The only instance in which an interception was terminated prematurely was one case—here the tap was connected to the wrong telephone line. Oct. 1974 Tr. 79.

[10] Appellants are correct in asserting that the validity of a search is not to be determined by what is found, as a general principle. United States v. Di Re, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948); Byars v. United States, 273 U.S. 28, 29, 47 S.Ct. 248, 71 L.Ed. 520 (1927). However, that principle is not relevant to the question of compliance with the minimization requirement, which necessarily turns on what is discovered in the course of the wiretap.

asserting that the agents' behavior would be unreasonable under any circumstances. On the contrary, if every call intercepted had been narcotic related, there would have been no occasion to consider whether it was necessary to minimize. Our decision in *James*, which also involved a total surveillance, makes it clear that interception of all conversations may be consistent with minimization in appropriate circumstances.[11]

[5] The trial court's error here lies in focusing on the reasonableness of the agents' intent rather than on the reasonableness of the particular interceptions which took place. The subjective intent of the monitoring agents is not a sound basis for evaluating the legality of the seizure. For example, the agents could publicly declare their intent to disobey the minimization provisions of the wiretap order, and yet it is possible that the ultimate interceptions will be found to have been reasonable. On the other hand, even if the agents make their best efforts to comply, the ultimate interceptions may prove to be so unreasonable that suppression is necessary. The presence or absence of a good faith attempt to minimize on the part of the agents is undoubtedly one factor to be considered in assessing whether the minimization requirement has been satisfied, but the decision on the suppression motion must ultimately be based on the reasonableness of the actual interceptions and not on whether the agents subjectively intended to minimize their interceptions.[12]

[6] The instant case of course does not present a situation where 100% of the intercepted conversations were nar-

[11] *See also* United States v. Quintana, 508 F.2d 867, 873 (7th Cir. 1975); United States v. Manfredi, 488 F.2d 588, 599–600 (2d Cir. 1973), *cert. denied*, 417 U.S. 936, 94 S.Ct. 2651, 41 L.Ed.2d 240 (1974); and United States v. Cox, 462 F.2d 1293, 1301 (8th Cir. 1972), *cert. denied*, 417 U.S. 918, 94 S.Ct. 2623, 41 L.Ed.2d 223 (1974), each upholding interception of all calls over periods of 20 days or longer.

[12] *James* states:

> The minimization requirement is satisfied if "on the whole the agents have shown a high regard for the right of privacy and have done all they *reasonably* could to avoid unnecessary intrusion."

494 F.2d at 1018 (emphasis in original). While this language indicates that the attitude of the agents is a relevant factor to be considered, we believe that the decisive factor is the second element—the objective reasonableness of the interceptions. When the monitoring agents fail to manifest "a high regard for the right of privacy," the Government will simply have a heavier burden of showing that the interceptions were reasonable.

cotic related. Thus it is necessary to determine whether interception of those calls which cannot be classified as narcotic related was nonetheless reasonable under the circumstances of this case. In deciding that they were not, the trial court placed heavy reliance on the original reports to the supervising judge which stated that only 40% of the calls were narcotic related, concluding that this data indicated a substantial number of conversations were not properly subject to interception and therefore minimization should have taken place. However, even if 60% of the calls were not related to narcotics transactions, it does not necessarily follow that the interception of these calls was unreasonable.[13] As we indicated in the remand order, the reasonableness of the interceptions must be assessed on a "particularized basis."[14] Before the court can hold that the agents failed to comply with the minimization requirement, it is necessary to show that some conversation was intercepted which clearly would not have been intercepted had reasonable attempts at minimization been made.

It is generally agreed that approximately 40% of the 384 conversations intercepted in this case were narcotic related and thus were properly intercepted. Of the remainder, many were of very short duration and were terminated before their relevance could be determined.[15] Others were

[13] Consider, for example, United States v. Quintana, 508 F.2d 867 (7th Cir. 1975), where of approximately 2000 calls that were intercepted, only 153 were considered germane enough to be transcribed, and only 47 were used at trial; and United States v. Manfredi, 488 F.2d 588 (2d Cir. 1973), *cert. denied*, 417 U.S. 936, 94 S.Ct. 2651, 41 L.Ed.2d 240 (1974), where of over 1000 calls monitored, only 150 were possibly relevant. Each court nonetheless found the interceptions to be reasonable and declined to suppress the evidence seized.

[14] 504 F.2d at 198.

[15] Other courts have held that any intercepted conversation lasting less than two minutes should be disregarded in evaluating compliance with the minimization requirement. *See, e.g.*, United States v. Bynum, 485 F.2d 490 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903, 94 S.Ct. 2598, 41 L.Ed.2d 209 (1974):

> The record here discloses that out of 2058 completed phone calls, 1277 of them (more than half) were completed in less than 2 minutes. Since, in a case of such wide-ranging criminal activity as this, it would be too brief a period for an eavesdropper even with experience to identify the caller and characterize the conversation as merely social or possibly tainted, we eliminate these calls from consideration. See United States v. Sisca, 361 F.Supp. 735, at 744 (S.D.N.Y. 1973); United States v. Focarile, 340 F.Supp. 1033, 1050 (D.Md.), aff'd sub nom., United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), cert. granted, 411 U.S. 905, 93 S.Ct. 1530, 36 L.Ed.2d 194 (1973);

extremely ambiguous in nature and possibly involved the use of codes to mask their true purpose. With respect to both types of call, we stated in *Scott*:

> Interception of those conversions cannot be considered unreasonable, for the agents could not have determined whether they were innocent prior to their termination.

504 F.2d at 198. This generally eliminates from consideration the group of calls classified as "ambiguous" in the Government's Call Analysis. Of the remaining 16% of the interceptions, many were one-time conversations which afforded the monitoring agents no opportunity to develop a category of innocent calls whose interception should be minimized.

The only conversations which have been specifically identified during the course of these proceedings as potentially subject to a minimization requirement are the so-called "Geneva-Mother" calls. These are seven calls between Geneva Jenkins, an accused conspirator, and her mother, which occurred on January 26, twice on January 27, January 28, twice on February 4, and February 12.[16] In *Scott*, this court made the following observations with respect to these calls:

> While all of the converations may appear in retrospect to have been innocent, that does not necessarily indicate that each interception was unreasonable. The conduct of the agents must be assessed in light of the information aavilable to them at the time. If the Government's assertion that agents had reasonable cause to suspect the mother's knowledge of the narcotics conspiracy proves correct, interception of those conversations would not be unreasonable, at least until such time as the initial suspicion should have been dissipated.

504 F.2d at 198 99. Further examination of the record leads us to conclude that the agents did not act unreasonably in intercepting these conversations.

United States v. LaGorga, 336 F.Supp. 190, 196 (W.D.Pa. 1971). Our concern is with the 781 conversations which lasted 2 or more minutes.

485 F.2d at 500. A large number of the calls intercepted in the instant case would be excluded under this principle, including most of those classified as "ambiguous" and all the recorded messages.

[16] These appear in the transcript of the tape of the interceptions at pages 24, 41, 44, 55, 132, 136 and 247 respectively.

[7] The first four calls were intercepted over a period of three days at the outset of the wiretapping and were of moderate length, each covering three or fewer pages of transcript. The second and fourth calls contain statements by Geneva which suggest that her mother may have had knowledge of the "business" operated by "Bernie" Thurmon. See Tape Tr. 42, 55. The fifth and sixth calls took place a week later. In each, the mother states that she has something to tell Geneva which she cannot mention over the telephone because "you ain't suppose[d to] talk *business* on the phone." Tape Tr. 134 (emphasis added). The seventh call is a lengthy conversation in which the only material which could possibly have been related to the narcotics investigation is a statement by the mother that one "Reds," who was in some way involved in the conspiracy, had called and asked for a telephone number. This call is a good example of a seemingly innocent call that might have turned out to incriminate one of the callers as participating in the criminal activity.

While it is apparent in retrospect that none of these conversations were material to the investigation of the narcotics conspiracy, the agents cannot be said to have acted unreasonably at the time they made the interceptions. The repeated references to "business" were sufficient to give them a reasonable belief that future interceptions might produce material evidence, and all such references were probative of scienter. If the "Geneva-Mother" conversations had continued to the end of the wiretap, or if there had been a greater number of them, we might well conclude that at some point the agents could no longer have had a reasonable expectation of discovering material evidence and thus should have acted to minimize the interceptions. However, we do not believe that such a point was reached in this case. Because we find no category of conversation which would have required the institution of a minimization procedure by the monitoring agents, and appellants have identified none, it should necessarily follow that the interceptions were not unreasonable. We also apply the *James* criteria to show that the extent of the surveillance was not unreasonable under the particular facts of this case.

1. *Scope of the criminal enterprise*: The trial court made no specific findings with respect to this factor. However, it is clear that appellants were operating a fairly extensive narcotics business. A thorough surveillance of their activi-

ties was necessary to disclose the extent of their conspiracy and the identity of the conspirators.[17] In addition, there was testimony that the conspirators used coded language and would occasionally discuss irrelevant matters at the outset of a conversation (Oct. 1974 Tr. 75-78, 354-58). As *James* states:

> Where the members of a conspiracy act with great circumspection, agents may be justified in monitoring a significant part, or perhaps all, of a conversation in order to be sure that it is indeed innocent. A number of reported cases have noted the use of codes within narcotics conspiracies so that superficially innocent conversations are actually highly relevant to the investigation. . . . Another technique often found is the use of guarded language or the deliberate discussion of irrelevant matters during the early moments of a conversation so that; if the conversations are being monitored, agents, assuming the call to be innocent, will cease the interception.

494 F.2d at 1019. Similar elements in the present case also justified a more intense surveillance.

[8, 9] 2. *Use of the telephone*: While these telephones were not devoted to "business" purposes to the same extent as the one tapped in *James*, the fact that at least 40% of the calls were related to the narcotics operation suggests that they were not entitled to the same extent of protection as would be afforded in the case of telephones used primarily for lawful purposes. The trial court appears to have relied heavily on the fact that the telephones in this case were located in residences in finding that they were not the type of "business" phones that were involved in *James*. Be that as it may, they were heavily used in the narcotics "business" and the fact that they were located in residences does not immunize them from a court ordered interception. The actual use of the telephones is at least as relevant to the question of the level of surveillance which is reasonable as is their physical location. See *James*, 494 F.2d at 1020. In this case, the high proportion of narcotic related calls justified a more intensive surveillance than would be justified where the traffic in narcotics related calls was much lighter.

[17] *See James*, 494 F.2d at 1019:

> Where the criminal enterprise under investigation is a large-scale conspiracy with many participants, it may be necessary for the government to monitor more conversations with greater intensity than when the investigation is more limited.

3. *Government expectation of the contents of the calls*: On this point, the District Court concluded that the criminal operation discovered was of lesser dimension than originally anticipated. It is conceded that the agents originally expected to uncover an operation dealing in the interstate importation and distribution of narcotics. What they found instead was a local retail outlet serving numerous pushers and users. While what was discovered may be classified as less far reaching geographically, it does not necessarily follow that a less intensive surveillance of the operation would suffice to obtain the evidence needed to support a successful prosecution of the participants. What occurred here was a change in the nature of the operation, not a change in the scope of the activity discovered. Appellants' operation was sufficiently large that it required a relatively extensive surveillance to disclose the features of the conspiracy. As this court stated in *James*, "[i]f the fruits of the tap in its early stages reveal a pattern of criminal conduct unknown to the government at the time of the initiation of the tap, then an expanded policy of interception (within the confines of the court order) may be justified." 494 F.2d at 1020-21.

[10] 4. *Judicial supervision*: It is true that the supervising judge was never specifically informed that the agents were not minimizing the interception of any conversations. However, the reports made to him every five days by the monitoring agents, which were relied upon by the trial court in reaching its conclusion that the agents were not acting reasonably, disclosed the number of calls that were intercepted and the number of those which were narcotic related.[18] It is thus clear that the judge was aware of the number of irrelevant conversations which were being intercepted and could have modified the wiretap authorization had he believed that any such action was appropriate. This interception order only ran for thirty days, not an overly long period for a wiretap in a narcotics conspiracy case, and we find no deficiency in the judge's supervision which would justify a conclusion that the wiretaps were conducted in an unreasonable manner. However, in issuing orders under 18 U.S.C. § 2518 in the future, courts should include a provision

[18] *See* Findings of Fact, ¶¶ 6, 7.

requiring that periodic reports to the supervising judge specifically include statements on attempts to minimize. This will guarantee that the uncertainties in this record are not duplicated in future cases and will further the intent of Congress.

Since we conclude that interception of all 384 conversations was not unreasonable under the circumstances of this case, the evidence seized by the wiretaps is not subject to suppression for failure to comply with the statutory minimization requirement.[19] We therefore reverse the order suppressing all evidence derived from the wiretaps and

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[19] Because we find that the minimization requirement was not violated, we have no occasion to consider the appropriate remedy in the event of a violation. However, we note that those courts which have considered the issue have concluded that suppression should be limited to the evidence seized which was beyond the scope of the wiretap authorization. *See* United States v. Cox, 462 F.2d 1293, 1301-02 (8th Cir. 1972), *cert. denied*, 417 U.S. 918, 94 S.Ct. 2623, 41 L.Ed.2d 223 (1974):

> Furthermore, even if the surveillance in this case did reflect a failure to minimize, it would not follow that Congress intended that as a consequence all the evidence obtained should be suppressed. Quite the contrary, 18 U.S.C. § 2517 manifests an intent to utilize *all* the evidence obtained by eavesdropping, and § 2517(5) expressly permits the use in court of evidence obtained by wiretap of a crime other than the crime upon which the court order was premised. Clearly Congress did not intend that evidence directly within the ambit of a lawful order should be suppressed because the officers, while awaiting the incriminating evidence, also gathered extraneous conversations. The nonincriminating evidence could be suppressed pursuant to 18 U.S.C. § 2518(10)(a), but the conversations the warrant contemplated overhearing would be admitted. If appellants, and the unindicted persons whose conversations were overheard, have any remedy under Title III other than the suppression of conversations outside the warrant's scope, it lies in § 2520 as a civil suit against the investigating officers alleging that they exceeded their authority. *See* United States v. LaGorga, 336 F.Supp. at 196–197.

(Footnote omitted.) *See also* United States v. Sisca, 361 F.Supp. 735, 746 47 (S.D.N.Y. 1973), *aff'd* 503 F.2d 1337 (2d Cir. 1974); United States v. Mainello, 345 F.Supp. 863, 874–77 (E.D.N.Y. 1972); United States v. King, 335 F.Supp. 523, 543–45 (S.D.Cal. 1971), *rev'd on other grounds*, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920, 94 S.Ct. 2628, 41 L.Ed.2d 226 (1974); *cf.* United States v. Leta, 332 F.Supp. 1357, 1360 n.4 (M.D.Pa. 1971); United States v. Lanza, 349 F.Supp. 929 (M.D.Fla. 1972).

In fact, the principal case ordering total suppression as the proper remedy is the District Court's first suppression order in the instant case, United States v. Scott, 331 F.Supp. 233 (D.D.C.1971), which was subsequently vacated by this court. Even if the court was correct in holding that the agents had acted unreasonably in this case, does not appear that total suppression of the evidence obtained from the wiretap was the proper remedy in light of the above cases.

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remand the case to the District Court for further proceedings consistent herewith. In light of the large amount of time which we have noted has already elapsed in this case, we have expedited this opinion ahead of many others that were argued earlier, and the District Court is urged to bring appellants to trial as quickly as possible.

Judgment accordingly.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-2097
United States of America,
Appellant
v.
Frank Ricardo Scott,
a/k/a "Reds", et al.,

No. 74-2098
United States of America,
Appellant
v.
Bernis Lee Thurmon,
a/k/a Benjamin Thornton,
et al.,

September Term, 1975
Criminal 1088-70
United States Court of Appeals for the District of Columbia Circuit
Filed Oct. 3, 1975
Hugh E. Kline, Clerk
Criminal 1089-70

ORDER

Appellants' suggestion for rehearing *en banc* having been transmitted to the full Court and there not being a majority of the Judges in regular active service in favor of having this case reheard *en banc,* it is

ORDERED by the Court *en banc* that the aforesaid suggestion for rehearing *en banc* is denied.

For the Court:
HUGH E. KLINE
Clerk

Received Oct. 6, 1975

rdm

Statement of Circuit Judge Robinson, with whom Chief Judge Bazelon and Circuit Judges Wright and Leventhal concur, as to why he would grant rehearing *en banc* attached.

No. 74-2097—United States v. Scott
No. 74-2098—United States v. Thurmon

STATEMENT OF CIRCUIT JUDGE ROBINSON, WITH WHOM CHIEF JUDGE BAZELON AND CIRCUIT JUDGES WRIGHT AND LEVENTHAL CONCUR, AS TO WHY HE WOULD GRANT REHEARING EN BANC

SPOTTSWOOD W. ROBINSON, III, Circuit Judge:

The decision in these cases appears to be seriously inconsistent with our earlier decision in *United States* v. *James.*[1] Beyond that, the extent to which judicial interpretations of a statute sanctioning telephone wiretaps may tolerate otherwise unconstitutional invasions of privacy is a question of exceptional and recurring importance. For these reasons—traditional foundations for full-court consideration [2]—I would grant rehearing *en banc* in these cases.

The governing statute requires all judicially authorized wiretapping to "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception. . . ." [3] *James* adopted a construction of this provision which was formulated originally by the Second Circuit.[4] Under the *James* standard, the duty to minimize is satisfied "if 'on the whole the [intercepting] agents have shown a high regard for the right of privacy and have done all they *reasonably* could to avoid unnecessary intrusions.'" [5] Thus *James* demands an inquiry as to the intercepting' agent's subjective intent to mininize the interception of innocent calls, as well as an objective determination that the agent could reasonably have believed that calls actually intercepted were likely to be illicit.[6]

The instant decision acknowledges this holding in *James,*

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[1] 161 U.S.App.D.C. 88, 494 F.2d 1007, *cert. denied,* 419 U.S. 1020, 95 S.Ct. 495, 43 L.Ed.2d 294 (1974).

[2] See Fed.R.App.P. 35(a).

[3] Omnibus Crime Control and Safe Streets Act of 1968, Pub.L. No. 90-351, tit. III, § 802, 82 Stat. 218 (1968), 18 U.S.C. § 2518(5) (1970).

[4] *United States* v. *Tortorello,* 480 F.2d 764 (2d Cir.), *cert. denied,* 414 U.S. 866, 94 S.Ct. 63, 38 L.Ed.2d 86 (1973).

[5] *United States* v. *James, supra* note 1, 161 U.S. App.D.C. at 99, 494 F.2d at 1018, quoting *United States* v. *Tortorello, supra* note 4, 480 F.2d at 784 (emphasis in *James*).

[6] *United States* v. *James, supra* note 1, 161 U.S. App.D.C. at 99, 494 F.2d at 1018.

but concludes that although the agents' attitude "is a relevant factor to be considered, . . . the decisive factor is the second element—the objective reasonableness of the interceptions." [7] The first element is relegated to a far less significant position: "[t]he subjective intent of the monitoring agents is not a sound basis for evaluating the legality of the seizure;" [8] [w]hen the monitoring agents fail to manifest 'a high regard for the right of privacy,' the Government will simply have a heavier burden of showing that the interceptions were reasonable." [9] Indeed, that court now says that "the agents could publicly declare their intent to disobey the minimization provisions of the wiretap order, and yet it is possible that the ultimate interceptions will be found to have been reasonable." [10]

Despite the admitted fact that "[t]hroughout these proceedings the Government has conceded that its agents did not minimize the interception of any conversations," [11] and the further fact, found by the District Court, that there was a "knowing and purposeful failure by the monitoring agents to comply with [its] minimization order," [12] the decision herein rejects the District Court's ruling "that the failure to attempt minimization was itself proof that the interceptions were unreasonable." [13] The opinion does concede that "[t]he presence or absence of a good faith attempt to minimize on the part of the agents is undoubtedly one factor to be considered in assessing whether the minimization requirements has been satisfied." [14] But the court stresses that in the final analysis "the decision on . . . suppression . . . must ultimately be based on the reasonableness of the actual interceptions and not on whether the agents subjectively intended to minimize their interceptions." [15]

This interpretation effectively destroys the subjective criterion of *James*' two-pronged standard for minimization

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[7] *United States* v. *Scott*, No. 74-2097 (D.C. Cir. July 25, 1975), at 1301 n.12.

[8] *Id.* at 1301.

[9] *Id.* at 1301 n.12, quoting *United States* v. *James*, *supra* note 1, 161 U.S. App.D.C. at 99, 494 F.2d at 1018.

[10] *United States* v. *Scott*, *supra* note 7, at 1301.

[11] *Id.* at 1300.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 1301.

[15] *Id.*

efforts, and fatally undermines the force of the minimization requirement itself. Once the decisive test of the validity of an interception becomes its "objective reasonableness," [16] there is grave danger that determinations of reasonableness will be dictated by hindsight evaluations of evidence uncovered by wiretaps. This, in turn, is bound to generate a strong temptation to wiretap first and then use the fruits of the interception in an effort to demonstrate that the intrusion was justified. Courts have repeatedly refused to validate searches and seizures in this after-the-fact manner,[17] and any decision which implies that Fourth Amendment safeguards apply should itself define the extent to which would-be wiretappers must maintain allegience to the statute and the Fourth Amendment.

No. 75-5688. SCOTT ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE POWELL would grant certiorari. Reported below: 170 U. S. App. D. C. 158, 516 F.2d 751. April 5, 1976.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL concurs, dissenting.

The Court today again refuses to grant certiorari to consider the proper implementation of the "minimization" requirement of 18 U.S.C. § 2518 (5), one of the core provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. See, *e.g.*, *Bynum* v. *United States*, 423 U. S. 952 (1975) (BRENNAN, J., dissenting from denial of cert.). The "minimization" provision, which requires that every order and extension thereof authorizing electronic surveillance shall "contain a provision that the authorization to intercept shall be . . . conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter,"

> "constitutes the congressionally designed bulwark against conduct of authorized electronic surveillance in a manner that violates the constitutional guidelines announced in *Berger* v. *New York*, 388 U. S. 41 (1967), and *Katz* v. *United States*, 389 U. S. 347 (1967). Congress has explicitly informed us that the 'minimization' and companion safeguards [*e.g.*, §§ 2518 (3)(a), (b), (c), and (d)] were designed to assure that 'the order will link

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[16] See text *supra* at note 7.

[17] See note 18, *infra*.

> up specific person, specific offense, and specific place. Together [the provisions of Title III] are intended to meet the test of the Constitution that electronic surveillance techniques be used only under the most precise and discriminate circumstances, which fully comply with the requirement of particularity.' S.Rep. No. 1097, 90th Cong., 2d Sess., 102 (1968)." *Bynum* v. *United States, supra,* at 952.

When the Court denied certiorari in *Bynum,* I indicated my reasons for believing that "we plainly fail in our judicial responsibility when we do not review these cases to give content to the congressional mandate of 'minimization,'" particularly since guidance for judges authorizing electronic surveillance "is absolutely essential if the congressional mandate to confine execution of authorized' surveillances within constitutional and statutory bounds is to be carried out." *Id.,* at 958-959, 953. That review is no less appropriate now. Indeed, it is even more urgent in light of the proliferation of opinions—exemplified by this case from the Court of Appeals for the District of Columbia Circuit—sanctioning round-the-clock surveillance in which every conversation, whether innocuous or incriminating, is intercepted.

The facts of this case are relatively simple. The Government sought and obtained authorization to intercept wire communications over a certain specified telephone on the ground that there was probable cause to believe that certain named individuals were using that telephone in connection with the commission of narcotics offenses, and that information concerning the offenses would be obtained through the interception of the communications over the telephone. The order authorized the interception of conversations relating to the illegal importation and transportation of narcotics and, as required by § 2518 (5), specified that the interception "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter."

Although the monitoring agents were aware of the minimization requirement, the agent in charge testified that no attempt was made to minimize the interceptions. In fact, the agents listened to and recorded each and every one of the 384 calls completed over the subject telephone during the 30 days the surveillance was in effect, even though the agents' contemporaneous reports to the supervising judge classified the intercepted calls as only 40% narcotics related and 60% non-narcotics related. The agents also never informed the judge that they were taking no steps to minimize the amount of surveillance.

After the surveillance was terminated and petitioners and others were arrested, the District Judge conducted pretrial hearings on the question whether all evidence obtained during the surveillance, and the fruits thereof, had to be suppressed on the ground of noncompliance with the minimization mandate of the statute and the explicit provision of the wiretap authorization. The judge, finding that the agents "did not even attempt 'lip service compliance' with the provision of the order and statutory mandate but rather completely disregarded it." 331 F. Supp. 233, 247 (1971), ordered the complete suppression of all evidence obtained directly or indirectly through the surveillance. *Id.,* at 248. On appeal, the Court of Appeals remanded for further consideration in light of another case in which it had adopted a test by which the statutory command of minimization was considered to be satisfied if monitoring agents made good faith efforts to minimize and if those efforts were reasonable. 164 U. S. App. D. C. 125, 504 F.2d 194 (1974).

On remand, further hearings were held, and the District Judge again concluded that "the monitoring agents made no attempt to comply with the minimization order of the Court but listened to and recorded all calls over the [subject's] telephone. They showed no regard for the right of privacy and did nothing to avoid unnecessary intrusion." Crim. No. 1088-70, Nov. 12, 1974; App. 14a. The judge again acknowledged the "knowing and purposeful failure to comply with or even attempt to comply with the minimization requirements," *id.,* at 17a, and held that this "admitted" "conduct would be unreasonable even if every intercepted call were narcotic-related." *Id.,* at 18a.

On appeal, the Court of Appeals again reversed, concluding that surveillance was reasonable because, in light of the conversations actually intercepted, it could not identify any categories of calls which could not have been reasonably intercepted even if minimization procedures had been instituted. 170 U. S. App. D. C. 158, 516 F.2d 751 (1975). The bad faith of the monitoring agents in not instituting any minimization procedures was thus deemed essentially irrelevant: the "agents could publicly declare their intent

to disobey the minimization provisions of the wiretap order, and yet it is possible that the ultimate interceptions will be found to have been reasonable." *Id.*, at 163, 516 F.2d, at 756.

Rehearing en banc was denied, — U. S. App. D. C. —, 522 F.2d 1333, with four judges stating why they believed reconsideration by the full court was absolutely essential. Their statement is pertinent as an indication of the necessity for granting certiorari in this case. The dissenters observed, *id.*, at —, 522 F.2d, at 1333-1334 (Robinson, J., joined by Bazelon, C. J., and Wright and Leventhal, JJ.) (emphasis supplied, footnotes omitted):

> "The decision in these cases appears to be seriously inconsistent with our earlier decision in *United States* v. *James*, [161 U. S. App. D. C. 88, 494 F.2d 1007, cert. denied *sub nom. Tantillo* v. *United States*, 419 U. S. 1020 (1974)]. Beyond that, *the extent to which judicial interpretations of a statute sanctioning telephone wiretaps may tolerate otherwise unconstitutional invasions of privacy is a question of exceptional and recurring importance.* For these reasons—traditional foundations for full-court consideration—I would grant rehearing *en banc* in these cases.
>
> "The governing statute requires all judicially authorized wiretapping to 'be conducted in such a way as to minimize the interception of communications not otherwise subject to interception . . . .' *James* adopted a construction of this provision which was formulated originally by the Second Circuit. Under the *James* standard, the duty to minimize is satisfied 'if "on the whole the [intercepting] agents have shown a high regard for the right of privacy and have done all they *reasonably* could to avoid unnecessary intrusions."' Thus *James* demands an inquiry as to the intercepting agent's subjective intent to minimize the interception of innocent calls, as well as an objective determination that the agent could reasonably have believed that calls actually intercepted were likely to be illicit.
>
> "The instant decision acknowledges this holding in *James*, but concludes that although the agents' attitude 'is a relevant factor to be considered, . . . the decisive factor is the second element—the objective reasonableness of the interceptions.' The first element is relegated to a far less significant position: '[t]he subjective intent

> of the monitoring agents is not a sound basis for evaluating the legality of the seizure;' '[w]hen the monitoring agents fail to manifest "a high regard for the right of privacy," the Government will simply have a heavier burden of showing that the interceptions were reasonable.' Indeed, the court now says that 'the agents could publicly declare their intent to disobey the minimization provisions of the wiretap order, and yet it is possible that the ultimate interceptions will be found to have been reasonable.'
>
> "Despite the admitted fact that '[t]hroughout these proceedings the Government has conceded that its agents did not minimize the interception of any conversations,' and the further fact, found by the District Court, that there was a 'knowing and purposeful failure by the monitoring agents to comply with [its] minimization order,' the decision herein rejects the District Court's ruling 'that the failure to attempt minimization was itself proof that the interceptions were unreasonable.' The opinion does concede that '[t]he presence or absence of a good faith attempt to minimize on the part of the agents is undoubtedly one factor to be considered in assessing whether the minimization requirements [*sic*] has been satisfied.' But the court stresses that in the final analysis 'the decision on . . . suppression . . . must ultimately be based on the reasonableness of the actual interceptions and not on whether the agents subjectively intended to minimize their interceptions.'
>
> "This interpretation effectively destroys the subjective criterion of *James*' two-pronged standard for minimization efforts, and fatally undermines the force of the minimization requirement itself. *Once the decisive test of the validity of an interception becomes its 'objective reasonableness,' there is grave danger that determinations of reasonableness will be dictated by hindsight evaluations of evidence uncovered by wiretape.* This, in turn, is bound to generate a strong temptation to wiretap first and then use the fruits of the interception in an effort to demonstrate that the intrusion was justified. Courts have repeatedly refused to validate searches and seizures in this after-the-fact manner, and any decision which implies that Fourth Amendment safeguards apply less stringently to wiretaps than to other searches deserves close scrutiny by the entire court.

"Moreover, the practical ramifications of this decision are serious. It appears to destroy any incentive for law enforcement agents conducting wiretap surveillances to respect the rights of citizens to privacy in noncriminal telephone conversations in advance of their intrusion. *It is evident that when agents endeavor in good faith to honor these rights, innocent conversations are less likely to be intercepted. But when agents completely disregard their obligations to minimize no conversation is likely to escape their ears. That in my view is a result which hardly comports with a statute explicitly requiring minimization.* The court as a whole should take a hard look at these cases, and should itself define the extent to which would-be wiretappers must maintain allegiance to the statute and the Fourth Amendment."

Moreover, in *Walker* v. *United States, ante,* p. 917, in which the Court also denies certiorari today, a unanimous panel of the Court of Appeals for the District of Columbia Circuit declared that it would have found a violation of the minimization requirement had the Court of Appeals not denied rehearing en banc in *Scott:*

"This panel is of the view that § 2518 (5) was violated. However, this court in a case indistinguishable on this point, *United States* v. *Scott* . . . held otherwise. Since a suggestion to rehear *Scott en banc* was pending at the time this case was *sub judice,* this panel moved the court to rehear *Scott* and this case *en banc.* That motion was denied. . . . Under the circumstances, on this issue this panel is bound by the decision in *Scott.*" Memo., Crim. No. 1978-69, Oct. 3, 1975, p. 1; Pet. for Cert. 2a.

In light of the general importance of the minimization provision in the conduct of electronic surveillance and the conflict between the holding in *Scott* and other formulations of the minimization requirement, and especially in light of the *Scott* opinion's denigration of the importance of the monitoring agents' good-faith attempt to comply with the statute and its retroactive validation of a Fourth Amendment search on the basis of what was uncovered by the search, there is simply no justification for failing to grant the writ of certiorari in this case. The minimization issue is not clouded by other factors, and given the District Judge's findings of total noncompliance with the statutory command, only an unyielding hostility to the statutory command of minimization and to the constitutional interest in privacy which it was fashioned to protect, can motivate the Court to continue to refuse to review decisions which condone round-the-clock interception of every conversation that transpires during the conduct of a particular surveillance. No concern with crowded dockets, at a time when we review a not insubstantial number of trivial cases, can excuse the failure to address this crucial issue of statutory construction, fraught as it is with substantial constitutional overtones.

This refusal is not only inexcusable, but also especially anomalous in light of related actions by this Court in the electronic surveillance area. In *United States* v. *Kahn,* 415 U. S. 143 (1974), the Court, addressing the question of who must be named in an application and order authorizing surveillance, held:

"Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that the individual is 'committing the offense' for which the wiretap is sought." *Id.,* at 155.

In response to the argument of the Court of Appeals and the dissent, see *id.,* at 158-163 (Douglas, J., joined by BRENNAN and MARSHALL, JJ.), that such a conclusion would amount to approval of a general warrant proscribed by both Title III and the Fourth Amendment, the *Kahn* Court relied on the minimization mandate as an adequate safeguard to prevent such unlimited invasions of personal privacy, *id.,* at 154-155:

"[I]n accord with the statute the order required the agents to execute the warrant in such a manner as to minimize the interception of any innocent conversations. . . . Thus, the failure of the order to specify that Mrs. Kahn's conversations might be the subject of interception hardly left the executing agents free to seize at will every communication that came over the wire—and there is no indication that such abuses took place in this case."

Yet the Court has consistently refused, and today persists in that refusal, to confront a case presenting the minimization question and the abuse that emanates from the seizure of "every communication that came over the wire." Indeed,

the refusal is even more troubling since certiorari has been granted in *United States* v. *Donovan*, 424 U. S. 907 (1976), a case in which the Solicitor General requests that we dilute even further the standard enunciated in *Kahn* for naming the subjects of proposed surveillance. I fail to comprehend how, in light of the above passage from *Kahn*, the Court can undertake that analysis without concomitantly addressing the contours of the minimization requirement. Inaction can only continue evisceration of the statutory mandate and require that Congress take a further and clearly unnecessary step of enacting more legislation to give concrete content to § 2518 (5).

I would grant the petition for certiorari.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Application of the United States
of America in the Matter of
an Order Authorizing the
Interception of Oral and Wire
Communications

THOMAS A. FLANNERY, United States Attorney in and for the District of Columbia, being duly sworn deposes and says:

I am familiar with the contents of the Application made by my Assistant Harold J. Sullivan in the instant cause and with the contents of Exhibits "A" and "B" attached thereto, and hereby apply for an Order authorizing the interception of oral and wire communications pursuant to Section 2518 of Title 18 of the United States Code for the telephone facilities listed in the name of Geneva Thornton, 1425 N Street, Northwest, Washington, D. C. commonly used by Bernis Lee Thurmon and carrying telephone number 483-2948.

THOMAS A. FLANNERY
United States Attorney
for the District of Columbia
Washington, D. C.

Subscribed and sworn to before me
this *24th* day of January, 1970
John Lewis Smith, Jr.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Application of the United States of America in the Matter of an Order Authorizing the Interception of Oral and Wire Communications

APPLICATION

HAROLD J. SULLIVAN, an Assistant United States Attorney for the District of Columbia being duly sworn states:

1. This sworn application is submitted in support of an order authorizing the interception of wire communications. This application has been submitted only after lengthy discussion concerning the necessity for such an application with various officials of the Organized Crime and Racketeering Section, Department of Justice, Washington, D. C., together with agents of the Bureau of Narcotics and Dangerous Drugs, and members of the Metropolitan Police Department.

2. He is an "investigative or law enforcement officer—of the United States" within the meaning of Section 2510 (7) of Title 18, United States Code—that is, he is an attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in Section 2516 of Title 18.

3. Pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States has specially designated the Assistant Attorney General for the Criminal Division to authorize affiant to make this application for an order authorizing the interception of wire communications. The letter of authorization signed by the Assistant Attorney General is attached to this application as Exhibit A.

4. This application seeks authorization to intercept wire communications concerning offenses enumerated in Section 2516 of Title 18, United States Code,—that is, offenses involving the importation and sale of narcotics in violation of Section 174 of Title 21, and Section 371 of Title 18, United States Code, which are being committed by Alphonso H. Lee, Bernis Lee Thurmon, and others.

5. He has discussed all the circumstances of these offenses

with Special Agent Glennon L. Cooper of the District of Columbia Office of the Bureau of Narcotics and Dangerous Drugs who is fully familiar with the investigation herein and has sworn to the affidavit attached to this application as Exhibit B, which alleges the facts contained in the following paragraphs in order to show that:

A. There is probable cause to believe that Alphonso H. Lee, Bernis Lee Thurmon, and others are conspiring to commit, are committing, and are about to commit offenses involving the importation and sale of narcotics.

B. There is probable cause to believe that wire communications concerning those offenses will be obtained through the intereception authorization which is applied for herein.

C. Normal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used.

D. There is probable cause to believe that the telephone facilities are subscribed to by one Geneva Thornton at 1425 N Street, Northwest, Washington, D. C., carrying the telephone number 483-2948 is being used and will be used in connection with the commission of the offenses described above and is commonly used by Bernis Lee Thurmon.

6. No other application for authorization to intercept wire or oral communications from the above-described or any other facilities has been made in connection with the instant investigation.

WHEREFORE, your affiant believes that probable cause exists to believe that Alphonso H. Lee, Bernis Lee Thurmon, and others, are engaged in the commission of offenses involving the importation and sale of narcotics, that they have used, are using and will use the telephone facilities at 1425 N Street, Northwest, Washington, D. C., in connection with the commission of those offenses; that communications concerning those offenses will be intercepted from that facility; and that no other investigative procedure reasonably appears likely to succeed.

On the basis of the allegations contained in this application and on the basis of the affidavit attached, affiant herewith requests this court to issue an order, pursuant to the power conferred on it by Section 2518 of Title 18, United

States Code, authorizing the Bureau of Narcotics and Dangerous Drugs of the United States Department of Justice to intercept wire communications from the above-described facility for a period of twenty (20) days from the effective date of that order or until communications are intercepted which reveal the details of the scheme which has been used to smuggle narcotics into the United States and the participants and nature of the conspiracy involved therein.

c/cs Harold J. Sullivan
Assistant U.S. Attorney
Washington, D.C.

Subscribed and sworn to before me
this 24th day of January, 1970.
John Lewis Smith, Jr.

AFFIDAVIT

1. I am a Special Agent of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice. I am participating in and fully familiar with the investigation pending in our Bureau and the Narcotics Section of the Metropolitan Police Department of the narcotic wholesale trafficking activities of Alphonso H. Lee, also known as "Al," Bernis Lee Thurmon, also known as Benjamin Thornton, Frank Scott, also known as "Red," Gordie King, Irving Hendricks, Donald L. Brown, Benjamin H. Corbin, and unknowns including John Doe, a "silent partner" in the conspiracy to be described.

2. This application is submitted for an Order authorizing the interception of wire communications at 1425 N Street, N. W., Apartment #603, Washington, D. C., telephone number 483-2948. The subscriber to number 483-2948 is listed as Geneva Thornton. The type of communications sought to be intercepted are conversations among individuals in New York, New Jersey, Philadelphia, Virginia, and Washington which will reveal the details of a scheme used to smuggle narcotics into the United States, transport such narcotics into the Washington, D. C. area and distribute them in this area. The period for which interception is sought is twenty (20) days because of the continuing nature of the offenses described below, and because of the particular facts demonstrating such continuing offenses with numerous participants set forth in this affidavit especially in paragraphs 5, 7, and 8.

3. The principal subjects in this investigation are:

A. Alphonso H. Lee, also known as "Al," a Negro male, born on April 18, 1936. He has a light rough complexion and often wears a yellow colored bandana with black markings. He is 5'6" tall and weighs 150 pounds. He lives at 5195 Linnean Terrace, N.W. He rides a motorcycle bearing current D. C. license M 2806.

B. Bernis Lee Thurmon, also known as Benjamin Thornton, a Negro male, born May 29, 1933. He is 5'11" tall and weighs 165 pounds. He resides at 1425 N Street, N.W., Apt. 603. Thurmon is known to the Metropolitan Police Department I. D. Bureau as #190 647 and to the Federal Bureau of Investigation as #753 570D. Thurmon was arrested on January 26, 1962 and May 4, 1967 and charged

with possession of narcotics in violation of the Uniform Narcotics Act.

C. Frank Ricardo Scott, also known as "Red," a Negro male known to the Metropolitan Police Department I. D. Bureau by #142 069. He was born on November 23, 1915. Scott was arrested on July 7, 1962, and charged with violation of the Uniform Narcotics Act. He was arrested on February 21 and May 7, 1962, and charged with violation of the Harrison Narcotics Act. He was also arrested on April 29, 1959, for violation of the Dangerous Drug Act. Furthermore, Scott was indicted on October 8, 1963, for violation of the Harrison Narcotic Act and sentenced on January 20, 1964, for six months to ten years.

D. John Doe, the silent partner who is believed to be the kingpin of the Washington end of the conspiracy.

E. Gordon Roger King, a Negro male, born January 23, 1933. He is 5'10 1/2" tall and weighs 172 pounds. He resides at 3839 Nash Street, Southeast, Washington, D. C.

F. Irving Allen Hendricks, also known as "Sweetyman," Negro male, born December 26, 1920, at Baltimore, Maryland. Present address, 256 Illinois Avenue, Atlantic City, New Jersey. Federal Bureau of Investigation #622 516B, Bureau of Narcotics and Dangerous Drugs #D 690 148. Hendricks was arrested in Atlantic City, New Jersey on December 18, 1969, and charged with possession of narcotics.

G. Donald Leonard Brown, a Negro male, born on March 27, 1927, at Atlantic City, New Jersey, Federal Bureau of Investigation #376 12881. Bureau of Narcotics and Dangerous Drugs #D 690 149.

On November 27, 1969, Brown was arrested by local authorities in Atlantic City, New Jersey. He had eight ounces of heroin and two ounces of cocaine in his possession at the time of his arrest. Previously, Brown had been arrested on August 28, 1956, in Newark, New Jersey and charged with violation of Federal Narcotics Laws. He was sentenced to five years in prison on September 2, 1956. Brown was also arrested in Atlantic City, New Jersey on September 16, 1969, and charged with Possession of Narcotics, Possession of Prescription Drugs and Possession of Stolen Property.

H. Benjamin Harrison Corbin, also known as "Flabby,"

a Negro male born August 24, 1916, at Baltimore, Maryland. Present residence: 2337 Edmondson Avenue, Baltimore, Maryland. United States Passport #D-001122. He is a former merchant seaman who has made trips to Ecuador and Peru which have been verified. His Federal Bureau of Investigation identification number is #449-9854.

I. LeRoy Houston, also known as "Big Boy," a Negro male born on June 25, 1927. He is 6'3" tall and 190 pounds and has a dark complexion. His Metropolitan Police Department identification number is #105 591. Houston was arrested on August 4, 1969, for violation of the Harrison Narcotic Act.

4. A special employee of the Bureau of Narcotics and Dangerous Drugs whose information has been checked and verified on numerous occasions by agents of the Bureau of Narcotics and Dangerous Drugs has informed agents of the Bureau of Narcotics and Dangerous Drugs in the Philadelphia area that Donald Leonard Brown has been buying heroin and cocaine from Benjamin Corbin and Irving Hendricks. According to said special employee, Corbin travels overseas to purchase the heroin and cocaine for resale in the United States. A check of passport records indicates that on September 24, 1966, Corbin renewed his passport for the purpose of travelling to Ecuador. Agents of the Bureau of Narcotics and Dangerous Drugs determined by interviewing a Flight Agent of Lufthansa that Corbin did in fact leave the United States for Ecuador. Prior to this time on July 28, 1966, agents of the Bureau of Narcotics and Dangerous Drugs observed Corbin disembark from South America.

In July, 1969, Detective Poggi was told by an informant hereafter known as SE 175 that Frank Scott, also known as "Red" Scott was dealing in narcotics inside the Fantasy Restaurant and was obtaining said drugs from the person who was running the Fantasy Restaurant. SE 175 told Detective Poggi that "Red" Scott had travelled to Puerto Rico on at least one occasion. SE 175 later identified a photograph of Gordon Roger King as the man from whom Scott was receiving narcotics. Records of the Alcohol Beverage Commission reveal that one Gordon Roger King is the Secretary of K. C. Corporation trading as the Fantasy Restaurant.

5. An informant hereafter referred to as SE 54 has advised that the subject "Al" has informed him that he is from New York and came to the District of Columbia area about twelve years ago at which time he went into the illicit narcotic business. "Al" has told SE 54 that although he has been in the illicit narcotics business for many years he has never been apprehended. He attributes this to skillful management of his operation. This operation, according to SE 54, involves great care in selecting purchasers and sellers of narcotics, frequent changes in meeting places, and the use of motorcycles by messengers for deliveries to avoid surveillance by law enforcement officers. SE 54 has participated in conversations with associates of "Al" in which these associates have described the methods by which narcotics are flown from New York into Dulles Airport where they are picked up by "Al's" operators and stashed at a certain place in Virginia.

SE 54 has advised that he became involved in narcotic drug traffic more than a year ago at which time he met the subject known to him as "Al." SE 54 became an employee of said "Al" and was soon selling about several hundred dollars worth of heroin per day. According to SE 54 "Al" brought its orders of narcotics to a location in the vicinity of the Fantasy near 13th and U Streets, N.W., Washington, D. C. On several occasions when SE 54 was picking up its package of narcotics it observed numerous other packages of narcotics upon which were written the names of different persons. Since the narcotics "bust" on August 18, 1969, which resulted in the arrest of approximately 40 persons, "Al" has changed his places of deliver and currently delivers to SE 54 at a location in Northwest Washintgon, hereinafter referred to as location D. In describing the magnitude of "Al's" operation, SE 54 has stated that "Al" as part of his continuing narcotics operation manages the narcotics business of the above-described Frank Scott, also known as "Red" when Scott is out of the country. Furthermore, "Al" has told SE 54 that he frequently goes to New York and Virginia to engage in narcotics transactions. SE 54 has told Detective Merritt that "Al" had told it that he and Gordon King, the owner of Gordies Liquors at 14th and U Streets, N.W., Washington, D. C., and owner of the Fantasy Restaurant were "partners." SE 54 further stated that he had contacted a Negro female bartender at the Fantasy Restaurant, known to him as Bernice, for the purpose of setting up a narcotics transaction with "Al." Records of

the Alcoholic Beverage Commission reveal that the sole owner of National Liquors, commonly referred to as Gordies Liquors, at 2001 14th Street, N.W., Washington, D. C., is one Gordon King. Alcoholic Beverage Commission records further indicate that one Bernice Davis, a Negro female, born on May 4, 1933, is a licensed manager of the Fantasy Restaurant. Members of both the Bureau of Narcotics and Dangerous Drugs and Metropolitan Police Department Narcotics Section have made undercover buys of narcotics in the Fantasy Restaurant. SE 54 states that "Al" is the principal lieutenant to Scott and is in charge of all narcotic dealing in the area of 12th and U Streets, N.W., Washington, D. C. SE 54 also states that there is a silent partner who is the top man in the operation. All means of investigation employed so far have failed to reveal the identity of this silent partner. SE 54 also states that Scott and "Al" have their own factory where they "cut" pure heroin. He has seen "Al" on one occasion carrying a bag containing more than three kilos of white powder which "Al" said was pure heroin. All means of investigation employed so far have failed to reveal the location of this factory.

6. The above informant has further advised that "Al" is one of the largest dealers of narcotics in the Washington, D. C. area, and that informant's services could assist in initiating a case against "Al." The above informant's reliability has been proven in the past. Specifically, on two occasions, his information has directly resulted in arrests of subjects for violations of the Harrison Narcotics Act. Other information concerning narcotics traffic in Washington from SE 54 has been checked and verified by members of the Metropolitan Police Department.

7. On or about September 3, 1969, SE 54 told Officer William J. Merritt of the Narcotic Section of the Metropolitan Police Department that it could arrange to buy narcotics from "Al." SE 54 further stated that it could make such arrangements by calling the telephone number 244-7054.

On or about September 11, 1969, SE 54 called the above number and spoke to "Al" and arranged to have a wholesale quantity of heroin delivered to it at Location D. This call was monitored by Detective Merritt with the permission of SE 54.

A surveillance was placed on 5195 Linnean Terrace, S.W., and at about 6:20 p.m. the officers conducting the surveil-

lance observed a Negro male leave the above premises riding a motorcycle (D. C. Tags M 2806). D. C. Tag M 2806 is listed to Benjamin Thornton of 1425 M Street, N.W., Apartment 603. It will be recalled that "Benjamin Thornton" is an alias used by Bernis Lee Thurman described above. At about 6:25 p.m. the same Negro male arrived at Location D and sold the previously agreed upon wholesale quantity of heroin to SE 54. The person selling the heroin was identified by SE 54 as "Al." This sale was observed by Detective Merritt. The chemist's analysis showed that the package sold to SE 54 contained 6.2 per cent pure heroin.

8. On or about Wednesday, September 17, 1969, SE 54 again dialed 244-7054, in the presence of Detective G. A. Brandani, who monitored the call with SE 54's permission. "Al" answered the phone and received SE 54's order for another wholesale quantity of heroin. "Al" told SE 54 to proceed to the same location D. At 11:28 a.m. the officer conducting surveillance of the Linnean Terrace, N.W. address observed two motorcycles leave from the rear of the Linnean Terrace, N.W. address. At approximately 12:25 p.m. on the same day, Detective Tribby who was conducting surveillance at Location D observed two motorcycles arrive. Thereafter SE 54 purchased the previously agreed upon wholesale quantity of 7.2 per cent pure heroin from the subjects. SE 54 later identified the Negro male operating the motorcycle bearing D. C. Tags M 2806 as "Al." He also later identified the other Negro male by photograph as "Al's" right hand man, Bernis Lee Thurman, Police Department I. D. Bureau #190-647. Thurmon has been identified by the resident manager of 1425 N Street, N.W., as the same person she knows as Benjamin Thornton, who rents Apartment 603 at that address. Benjamin Thornton is the subject to whom motorcycle M 2806 is listed which motorcycle is operated by "Al."

9. On the morning of December 17, 1969, Detectives Robert Tribby and Gabriel Brandani observed a late model automobile, District of Columbia Tag #748-879 arrive at 5195 Linnean Terrace, N.W. A white male departed from the car and delivered a package to a Negro male at 5195 Linnean Terrace, N.W. A photograph was taken by the detectives and the male who received the package was later identified by SE 54 from the photograph as "Al." Investigation revealed that the late model automobile described

above is registered to D & M Corporation, T. L. Higgers Drugs, 5015 Connecticut Avenue, N.W. The pharmacist at Higgers Drugs informed Detective McKennon that a delivery of two pounds of "lactose" otherwise known as milk sugar, had been made to 5195 Linnean Terrace, N.W., on the morning of December 17, 1969, pursuant to a request from a Mrs. Lee. The pharmacist stated that this was an uncommon request and that he had to order the product specially for Mrs. Lee. "Lactose" is a product commonly used to dilute pure heroin. Two pounds of lactose could be used to "cut" pure heroin into 17,000 capsules for street sale.

10. Further information has been received by Detectives Merritt and Poggi of the Metropolitan Police Department from Special Employee #144, an informant whose information has contributed to the arrests of narcotics violators, that said Special Employee has purchased heroin and cocaine from a man named "Bernie," who lives at 1425 N Street, N.W., Apartment 603, as late as Jan. 14, 1970. Said Special Employee has identified a photograph of Bernis Lee Thurmon as the "Bernie" who lives at 1425 N Street, N.W. SE 144 has informed Detectives Merritt and Poggi that "Bernie" keeps hundreds of capsules of heroin on his person for customers who come to his apartment, and that he and an associate named "Al" frequently operate motorcycles. SE 144 has told members of the Metropolitan Police Department that "Al" and one Gordie King are two of the biggest narcotic traffickers in the District of Columbia. According to SE 144, King travels to Puerto Rico and Bahamas. King told SE 144 that on one of his trips he gave a party at which he supplied several thousand dollars worth of cocaine. SE 144 does not know where "Al" obtains his narcotics but thinks that he transacts at least some of his business in Atlantic City, New Jersey. "Al" told SE 144 that he had wrecked his automobile in Atlantic City in mid-November. This same information regarding the wrecked automobile had previously been received from SE 54.

The subjects "Al" and Thurmon have been observed on numerous occasions by members of the Metropolitan Police Department, Narcotic Section, at 1425 N Street, N.W., and also at 5195 Linnean Terrace, N.W.

11. Records of the C & P Telephone Company obtained by subpoena indicate that the above 202-244-7027 was used on May 22, 23, 27, 28, June 1, 19, 24, July 9, and 26, 1969, to

call the number 609-345-6968, in Atlantic City, New Jersey, listed to Valerie Hendricks, 256 North Illinois Avenue, Atlantic City, New Jersey. Further records from the telephone company reflect that the above phone 609-345-6968 was used to call the telephone 202-244-7054 at 5195 Linnean Terrace on July 29, and August 11, 1969. Records also reflect that the Hendricks' phone was used to call the telephone number 301-233-5383, listed to Benjamin Harrison Corbin at Baltimore, Maryland. Toll records further reflect that Donald Leonard Brown has made numerous long distance telephone calls to Dallas, New York, and Philadelphia.

On November 19 and 21 and on December 10, 1969, the telephone number 244-7027, was used to call the number 609-345-7332, in Atlantic City, New Jersey. This number is listed to Ike's Liquor Store, which is owned by Issac Boswell Nicholson, described by the Federal Bureau of Investigation as the "number two man" in the numbers racket in Atlantic City. Nicholson has been arrested on numerous occasions for gambling violations.

On November 19, 1969, the telephone number 244-7027 was twice used to call the number 609-344-1657, which is listed to Frank Stewart, described by the Federal Bureau of Investigation as being involved in narcotics, prostitution and gambling. Stewart owns a bar which, according to the Federal Bureau of Investigation, is used for illegal narcotic transactions.

On November 21, December 8, and 10, 1969, the number 244-7027 was used to call the number 609-344-5919 listed in the Atlantic City, New Jersey, directory to Mamie Jones. The sister of Mamie Jones is one "Toody" Kirkland alleged to be a member of the Kirkland Brothers gang which, according to the Federal Bureau of Investigation, is involved in narcotics, gambling, and other criminal activities. The Federal Bureau of Investigation also reports that Mamie Jones is an associate of Maynard Francis Hayes, a suspected forger and narcotics violator. The number 609-344-5919 was also called from the number 244-7054 on November 26, 1969.

On November 5, 1969, Alphonso Lee was involved in an automobile accident in Atlantic City. According to the New Jersey State Police accident report the car he was driving was a 1969 Dodge bearing D. C. Tags #722-886, registered to Richard L. Scott. According to the report of William J. Long, a trooper of the New Jersey State Police, at the

time of the accident Lee had $2,000.00 in cash in his possession. Observations by Detectives Merritt and Poggi indicate that the automobile bearing D. C. Tags #722-886 is presently parked on the garage lot in the 1800 block of 14th Street, N.W., in a wrecked condition.

10. Surveillance of Alphonso H. Lee, also known as "Al" and his associates reflects that he is an extremely cautious and apprehensive violator. He varies his pattern of activities though he does make regular use of the phones at 5195 Linnean Terrace, N.W. When driving on his motorcycle he is constantly alert for surveillance.

10a. On January 12, 1970, Alphonso H. Lee was shot in the leg. Shortly thereafter SE 54 learned that Mrs. Teri A. Lee had temporarily taken over the management of "Al's" business and that for the time being SE 54 should make his orders by calling the number 483-2948. The subscriber is listed as Geneva Thornton at 1425 N Street, Northwest, Apartment #603. After learning this SE 54 called the above number and spoke with Bernis Lee Thurmon, a/k/a Benjamin Thornton. SE 54 ordered a large quantity of narcotics from Thurmon which was delivered to it in the Northwest section of the District of Columbia.

11. Although telephone toll records have been obtained for the telephones at his base of operations, it is believed that many of "Al's" arrangements are conducted through local telephone calls which would not be noted on the subpoenaed records.

12. In spite of intense surveillance of "Al" and his associates, investigators have been unable to uncover the source of supply for the narcotics operation in the District of Columbia. All normal investigative procedures have been used but none appears reasonably likely to succeed in identifying the source and uncovering the details sought.

13. I have not, nor has anyone to my knowledge made any application for authorization to intercept wire or oral communications from the above-described premises or from any other facilities in connection with this investigation.

WHEREFORE, your affiant believes that probable cause exists to believe that Alphonso H. Lee, also known as "Al" and other identified and unidentified persons, are engaged in the commission of an offense involving the importation of narcotics and conspiracy to do so; that Alphonso H. Lee operates at 5195 Linnean Terrace, Northwest, Washington,

D.C. in this District and within the jurisdiction of this Court; that affiant further believes that probable cause exists to believe that Bernis Lee Thurmon and others in the Alphonso H. Lee operation described above are enagged in the commission of an offense involving the importation of narcotics, and conspiracy to do so; that Bernis Lee Thurmon operates at 1425 N Street, Northwest, Washington, D. C. in this District and within the jurisdiction of this Court; that he has used and will continue to use the telephone numbered 483-2948 at this address, in connection with the commisison of this offense; that further communications concerning this offense will be made over these telephone facilities; and that no other investigative procedure reasonably appears likely to succeed.

On the basis of this affidavit the affiant herewith requests this Court to issue an order pursuant to Section 2518 of Title 18, United States Code, authorizing Special Agents of the Bureau of Narcotics and Dangerous Drugs of the United States Department of Justice to install a pen register, dialing recorder and to intercept wire communications from the number 483-2948 at 1425 N Street, Northwest, Washington, D.C., for a period of twenty (20) days from the effective date of the order.

GLENNON L. COOPER, Special Agent
Bureau of Narcotics and
Dangerous Drugs
Washington, D. C.

Subscribed and sworn to before me
this 24th day of January, 1970.
10:30 A.M.
John Lewis Smith, Jr.
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Application of the United States
of America in the Matter of an
Order Authorizing the Interception
of Wire Communications — No.

ORDER

AUTHORIZING INTERCEPTION OF WIRE COMMUNICATION

TO: Special Agents of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice

This matter having come on before the Court upon application of the United States through its attorneys, the United States Attorney Thomas A. Flannery and Assistant United States Attorney Harold J. Sullivan and one Glennon L. Cooper, a Special Agent, Bureau of Narcotics and Dangerous Drugs, Department of Justice, investigative and law enforcement officers as defined in Section 2510(7) of Title 18, United States Code, for an order authorizing the interception of wire communications pursuant to Section 2518 of Title 18, United States Code, and full consideration having been given to the matters set forth therein, the Court finds:

(a) There is probable cause to believe that Alphonso H. Lee also known as "Al," Bernis Lee Thurmon, and others are presently operating from 1425 N Street, Northwest, Washington, D. C., within this District, are committing and are about to commit and are conspiring with other persons to commit offenses set forth in Section 2516 of Title 18, to wit: the importation and transportation of narcotics in violation of Section 174 of Title 21 of the United States Code.

(b) There is probable cause to believe that communications concerning that offense will be obtained through the interception of wire communications, authorization for which the attached application has been made. In particular, these wire communications will concern the date and the manner in which narcotic drugs will be smuggled into the United States and the participants and the nature of the conspiracy involved therein and

the illicit destination of these narcotic drugs in this jurisdiction.

(c) All normal investigative procedures have been used but none appears reasonably likely to succeed in obtaining the above information.

(d) There is probable cause to believe that the telephone facilities at 1425 N Street, Northwest, Washington, D. C., listed to Geneva Thornton and carrying the telephone number 483-2948 is being used and is about to be used in connection with the commission of the above-described offenses and is commonly used by Alphonso H. Lee, also known as "Al," Bernis Lee Thurmon, and others.

WHEREFORE, it is hereby ordered that:

Special Agents of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice, are authorized, pursuant to application authorized by the Assistant Attorney General for the Criminal Division of the Department of Justice, who has been specially designated by the Attorney General of the United States to exercise the powers conferred on him by Section 2516 of Title 18, United States Code, to: Intercept the wire communications of Alphonso H. Lee, Bernis Lee Thurmon, and other persons as may make use of the facilities hereinbefore described.

PROVIDING THAT, this authorization to intercept wire communications shall be executed as soon as practicable after signing of this Order and shall be conducted in such a way as to minimize the interception of communications that are otherwise subject to interception under Chapter 119 of Title 18 of United States Code, and must terminate upon attainment of the authorized objectives, or, in any event at the end of thirty (30) days from date.

PROVIDING ALSO, that Harold J. Sullivan shall provide the Court with a report detailing the progress of the interception and the nature of the communication intercepted on the 5th, 10th, 15th, 20th, and 25th day following the date of this Order.

J. Lewis Smith, Jr.
Judge
U.S. District Judge for D.C.

1/24/70 10:30 A.M.
Date

UNITED STATES GOVERNMENT DEPARTMENT OF JUSTICE

Memorandum

To : John Lewis Smith, Judge
United States District Court
for the District of Columbia
Date: Jan. 29, 1970

From : Harold J. Sullivan
Chief, Major Crimes Unit

Subject: Intercept of January 24, 1970

The intercept as 1425 N Street, Northwest, Apartment 603, phone number 483-2948, was connected on Saturday, January 24, 1970, at approximately 8:00 p.m. No communications were intercepted until 1:45 p.m. on Sunday, January 25, 1970, after the subject, Bernis Thurmon, was seen entering the premises. Between 1:45 p.m. on January 25, 1970, and 10:48 p.m., January 25, 1970, there were a total of 17 communications recorded. Eight of these involved narcotics transactions between various individuals, at phones other than that above, and a person who identified himself as "Joe" and a person who identified himself as "Bern" or "Bernie" at the telephone numbered 483-2948.

There were no calls recorded between 10:48 p.m. on January 25, 1970, and 8:00 a.m. January 26, 1970. From 8:00 a.m., January 26, 1970 until 8:00 a.m. January 27, 1970, a total of 19 telephone communications were recorded, five of which involved narcotics or narcotics transactions.*

It should be noted that at 6:49 p.m. on January 25, 1970, a male who identified himself as "Red" called to arrange a meeting. This individual may be the subject Frank Scott also known as "Red" named in the affidavit in support of the intercept. It should also be noted that on January 26, 1970, at 5:48 p.m., in a conversation between a female who identified herself as Geneva and "Bernie," reference was made to the "54" number. The telephones at the Linnean Terrace address referred to in the affidavit are 244-7054 and 244-7027.

On January 27, 1970, at 6:25 p.m. Geneva called Freedman's Hospital, Ward 6, where Alphonso H. Lee has been staying since he was shot.

* From 8:00 a.m., January 27, 1970, until 8:00 a.m. January 28, 1970, a total of 13 conversations were recorded two of which involved narcotics or narcotic transactions.

On January 28, 1970, at "Al" called "Bernie" at 483-2948, and talked about $1985 that Bernie owed "Al." Alphonso H. Lee left Freedman's Hospital on the evening of January 27, 1970.

UNITED STATES GOVERNMENT DEPARTMENT OF JUSTICE

Memorandum

To : John Lewis Smith, Judge
United States District Court
for the District of Columbia

Date: Feb. 3, 1970

From : Harold J. Sullivan
Chief, Major Crimes Unit

Subject: Intercept of January 24, 1970

Since 8:00 a.m. on January 29, 1970, the following developments have occurred in connection with the intercept at 1425 N Street, Northwest, Apartment 603.

Between the period 8:00 a.m. on January 29, 1970, and 8:00 a.m. on January 30, 1970, a total of 18 conversations were intercepted and recorded. Of these 18 conversations, 6 were related to narcotics or narcotic transactions.

Between the period 8:00 a.m. on January 30 and 8:00 a.m. on January 31, 1970, 12 conversations were recorded, of which 7 were related to narcotics or narcotic transactions.

Between the period 8:00 a.m. on January 31 until 8:00 a.m. on February 1, 1970, a total of 14 conversations were recorded of which 6 were related to narcotics or narcotic transactions.

Between 8:00 a.m. on February 1, 1970, and 8:00 a.m. on February 2, 1970, a total of 6 conversations were recorded 3 of which were related to narcotics.

It should be noted that on January 30, 1970, a male who identified himself as "Bernie" called 638-2521, listed to Alan Cole at 1230 - 13th Street, Northwest, Apartment 518. This number was listed by Teri A. Lee as her address when she opened a bank account at Riggs National Bank of Washington. On January 30, 1970, a male who identified himself as Al called the intercepted number twice and during one call asked for Bernie and left the message that he could be reached at the "5-4" number. It should also be noted that on January 31, 1970, Bernie called a female whom he identified as "Liz" at the Delaware number 302-737-8740. Liz said that she was planning a trip to Washington with another female (a code word for cocaine).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Application of the United States of America in the Matter of an Order Authorizing the Interception of Wire Communications	Application

HAROLD J. SULLIVAN, an Assistant United States Attorney for the District of Columbia being duly sworn states:

1. This sworn application is submitted in support of an order authorizing the interception of wire communications. This application has been submitted only after lengthy discussion concerning the necessity for such an application with various officials of the Organized Crime and Racketeering Section, Department of Justice, Washington, D. C., together with agents of the Bureau of Narcotics and Dangerous Drugs, and members of the Metropolitan Police Department.

2. He is an "investigative or law enforcement officer—of the United States" within the meaning of Section 2510(7) of Title 18, United States Code—that is, he is an attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in Section 2516 of Title 18, United States Code.

3. Pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable John N. Mitchell, has specially designated in this proceeding the Assistant Attorney General for the Criminal Division, the Honorable Will Wilson, to authorize affiant to make this application for an order authorizing the intereception of wire communications. The letter of authorization signed by the Assistant Attorney General is attached to this application as Exhibit A.

4. This application seeks authorization to intercept wire communications concerning offenses enumerated in Section 2516 of Title 18, United States Code—that is, offenses involving the importation and sale of narcotics in violation of Section 174 of Title 21, and Section 371 of Title 18, United States Code, which are being committed by Alphonso H. Lee and others.

5. He has discussed all the circumstances of these offenses

with Special Agent Glennon L. Cooper of the District of Columbia Office of the Bureau of Narcotics and Dangerous Drugs who is fully familiar with the investigation herein and has sworn to the affidavit attached to this application as Exhibit B, and incorporated by reference herein, which alleges the facts therein in order to show that:

(a) there is probable cause to believe that Alphonso H. Lee, also known as "Al," and unknown others have committed, are committing, and are about to commit offenses involving the importation and sale of narcotics, in violation of 21 U.S.C. 174 and are conspiring to commit the aforesaid offenses in violation of 18 U.S.C. 371.

(b) there is probable cause to believe that wire communications of Alphonso H. Lee, also known as "Al," and unknown others, concerning those offenses will be obtained through the interception of wire communications. In particular, these wire communications will be between Alphonso H. Lee and his suppliers concerning: (1) the date, time, place, and manner in which illegal narcotic drugs will be delivered to Alphonso H. Lee, and (2) the price Alphonso H. Lee is to pay for the illegal narcotic drugs and the date, time, place, and manner of payment for said drugs. Also, these wire communications will be between Alphonso H. Lee and his buyers concerning: (1) the date, time, place, and manner in which Alphonso H. Lee will deliver illegal narcotic drugs or cause illegal narcotic drugs to be delivered to his buyers and (2) the price Alphonso H. Lee is to receive for the narcotic drugs, and the date, time, place, and manner of payment for said drugs.

(c) normal investigative procedures reasonably appear to be unlikely to succeed and are to dangerous to be used.

(d) there is probable cause to believe that the two telephones subscribed to by one Teri A. Lee at 5195 Linnean Terrace, Northwest, Washington, D. C., a private residence, and carrying the telephone numbers 244-7027 and 244-7054, respectively, are being used and will be used in connection with the commission of the offenses described above and are commonly used by Alphonso H. Lee, also known as "Al."

6. On January 24, 1970, an application made by affiant and the affidavit of Special Agent Glennon L. Cooper of the

District of Columbia Office of the Bureau of Narcotics and Dangerous Drugs, in support of said application were submitted to the Honorable John Lewis Smith, United States District Judge, District of Columbia, for a court order authorizing the Bureau of Narcotics and Dangerous Drugs to intercept wire communications for a twenty (20) day period to and from telephone number 483-2948 subscribed to by Geneva Thornton and located at Apartment #603, 1425 N Street, N. W., Washington, D. C., in connection with the investigation into possible violations of 21 U.S.C. 174 and 18 U.S.C. 371 by Bernis Lee Thurmon and others. On the basis of said application and affidavit, Judge Smith issued an order dated January 20, 1970, authorizing said interceptions for a period of twenty (20) days from the date of the order. The nature of some of these intercepted communications are set forth in the attached affidavit (Exhibit B) of Special Agent Glennon L. Cooper. Affiant attaches hereto, marked Exhibits C, D, and E, respectively, a copy of the above-described application, affidavit, and order on the basis that the information set forth in such documents is relevant and relates to the illegal narcotic activities being conducted by Alphonso H. Lee and unknown others on the above-described two telephones which are the subject of the present application.

WHEREFORE, your affiant believes that probable cause exists to believe that Alphonso H. Lee and unknown others, are engaged in the commission of offenses involving the importation and sale of narcotics and a conspiracy to do so; that they have used, are using, and will use the above-described two telephones at 5195 Linnean Terrace, Northwest, Washington, D. C., in connection with the commission of those offenses; that communications concerning those offenses will be intercepted from the above-described two telephones; and that normal investigative procedures reasonably appear to be unlikely to succeed.

On the basis of the allegations contained in this application and on the basis of the affidavit attached, affiant requests this court to issue an order, pursuant to the power conferred on it by Section 2518 of Title 18, United States Code, authorizing the Bureau of Narcotics and Dangerous Drugs of the United States Department of Justice to intercept wire communications from the above-described two telephones until communications are intercepted which reveal the details of the scheme which has been used by

Alphonso H. Lee and unknown others to transport, receive, conceal, and sell illegal narcotic drugs, and the identities of his confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of twenty (20) days from the date of the order, whichever is earlier.

HAROLD J. SULLIVAN
Assistant United States Attorney
Washington, D. C.

Subscribed and sworn to before
me this 4th day of February, 1970.

John Lewis Smith, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE MISC. NO. 11-70

This is to certify that the attached affidavit is a true copy of the original affidavit which I signed before Judge John Lewis Smith on February 4, 1970. Judge Smith also signed the original affidavit in my presence at that time.

GLENNON L. COOPER
Special Agent
Bureau of Narcotics and
Dangerous Drugs

Subscribed and sworn to before me this 6th day of May, 1970.

Joyce M. Swanson
Notary Public
My commission expires Feb. 28, 1973

AFFIDAVIT

1. I am a Special Agent of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice. I am participating in and fully familiar with the investigation pending in our Bureau and the Narcotics Section of the Metropolitan Police Department of the narcotic wholesale trafficking activities of Alphonso H. Lee, also known as "Al," Bernis Lee Thurmon, also known as Benjamin Thornton, Frank Scott, also known as "Red," Gordie King, Irving Hendricks, Donald L. Brown, Benjamin H. Corbin, and unknowns including John Doe, a "silent partner" in the conspiracy to be described.

2. This application is submitted for an Order authorizing the interception of wire communications at 5195 Linnean Terrace, N.W., Washington, D. C. telephone numbers 244-7054 and 244-7027. The premises at 5195 Linnean Terrace, N.W., are rented in the name of Mrs. Teri A. Lee, also known as Mrs. Alphonso H. Lee. The two telephones located at the above address are billed to Teri A. Lee. The number 244-7027 is listed in the C & P telephone book under the names of Teri A. Lee, Alphonso H. Lee and Steve Lee. The number 244-7054 is unlisted. The type of communications sought to be intercepted are conversations among individuals in New York, New Jersey, Philadelphia, Virginia and Washington which will reveal the details of a scheme used to smuggle narcotics into the United States, transport such narcotics into the Washington, D. C. area and distribute them in this area. The period for which interception is sought is thirty days because of the continuing nature of the offenses described below, and because of the particular facts demonstrating such continuing offenses with numerous participants set forth in this affidavit especially in paragraphs 5, 7 and 8.

3. The principal subjects in this investigation are:

A. Alphonso H. Lee, also known as "Al," a Negro male, born on April 18, 1936. He has a light rough complexion and often wears a yellow colored bandana with black markings. He is 5'6" tall and weighs 150 pounds. He lives at 5195 Linnean Terrace, N.W. He rides a motorcycle bearing current D. C. License M 2806.

B. Bernis Lee Thurmon, also known as Benjamin Thornton, a Negro male, born May 29, 1933. He is 5'11" tall and

weighs 165 pounds. He resides at 1425 N Street, N.W., Apt. 603. Thurmon is known to the Metropolitan Police Department I. D. Bureau as #190 647 and to the Federal Bureau of Investigation as #753 570D. Thurmon was arrested on January 26, 1962 and May 4, 1967 and charged with possession of narcotics in violation of the Uniform Narcotics Act.

C. Frank Ricardo Scott, also known as "Red," a Negro male known to the Metropolitan Police Department I. D. Bureau by #142 069. He was born on November 23, 1915. Scott was arrested on July 7, 1962, and charged with violation of the Uniform Narcotics Act. He was arrested on February 21 and May 7, 1962, and charged with violation of the Harrison Narcotics Act. He was also arrested on April 29, 1959, for violation of the Dangerous Drug Act. Furthermore, Scott was indicted on October 8, 1963, for violation of the Harrison Narcotic Act and sentenced on January 20, 1964, for six months to ten years.

D. John Doe, the silent partner who is believed to be the kingpin of the Washington end of the conspiracy.

E. Gordon Roger King, a Negro male, born January 23, 1933. He is 5'10½" tall and weighs 172 pounds. He resides at 3839 Nash Street, Southeast, Washington, D. C.

F. Irving Allen Hendricks, also known as "Sweetyman," Negro male, born December 26, 1920, at Baltimore, Maryland. Present address, 256 Illinois Avenue, Atlantic City, New Jersey. Federal Bureau of Investigation #622 516B, Bureau of Narcotics and Dangerous Drugs #D 690 143. Hendricks was arrested in Atlantic City, New Jersey on December 18, 1969, and charged with possession of narcotics.

G. Donald Leonard Brown, a Negro male, born on March 27, 1927, at Atlantic City, New Jersey, Federal Bureau of Investigation #376 12881, Bureau of Narcotics and Dangerous Drugs #D 690 149.

On November 27, 1969, Brown was arrested by local authorities in Atlantic City, New Jersey. He had eight ounces of heroin and two ounces of cocaine in his posession at the time of his arrest. Previously, Brown had been arrested on August 28, 1956, in Newark, New Jersey and charged with violation of Federal Narcotics Laws. He was sentenced to five years in prison on September 2, 1956. Brown was also arrested in Atlantic City, New Jersey on September 16, 1969, and charged with Possession of Narcotics, Possession of Prescription Drugs and Possession of Stolen Property.

H. Benjamin Harrison Corbin, also known as "Flabby," a Negro male born August 24, 1916, at Baltimore, Maryland. Present residence: 2337 Edmondson Avenue, Baltimore, Maryland. United States Passport #-001122. He is a former merchant seaman who has made trips to Ecuador and Peru which have been verified. His Federal Bureau of Investigation identification number is #449-9854.

I. Leroy Houston, also known as "Big Boy," a Negro male born on June 25, 1927. He is 6'3" tall and 190 pounds and has a dark complexion. His Metropolitan Police Department identification number is #105 591. Houston was arrested on August 4, 1969, for violation of the Harrison Narcotic Act.

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609-345-6968, in Atlantic City, New Jersey, listed to Valerie Hendricks, 256 North Illinois Avenue, Atlantic City, New Jersey. Further records from the telephone company indicate that the above phone 609-345-6968 was used to call the telephone 202-244-7054 at 5195 Linnean Terrace on July 29, and August 11, 1969. Records also reflect that the Hendricks' phone was used to call the telephone number 301-233-5363, listed to Benjamin Harrison Corbin at Baltimore, Maryland. Toll records further reflect that Donald Leonard Brown has made numerous long distance telephone calls to Dallas, New York and Philadelphia. These toll records will be updated by a further affidavit.

On November 5, 1969, Alphonso Lee was involved in an automobile accident in Atlantic City. According to the New Jersey State Police accident report the car he was driving was a 1969 Dodge bearing D. C. Tags #722-886, registered to Richard L. Scott. According to the report of William J. Long, a trooper of the New Jersey State Police, at the time of the accident Lee had $2,000.00 in cash in his possession. Observations by Detectives Merritt and Poggi indicate that the automobile bearing D. C. Tags #722-886 is presently parked on the garage lot in the 1800 block of 14th Street, N.W., in a wrecked condition.

12. On January 12, 1970, Alphonso Lee was admitted to Freedman's Hospital in the District of Columbia with bullet wounds to his leg, where he was hospitalized until January 28, 1970. On January 24, 1970, a court authorized intercept of telephone 483-2948 listed to Geneva Thornton at 1425 N

Street, Northwest, Apartment 603, Washington, D. C. was begun. The intercept revealed regular narcotic traffic by Bernis Lee Thurmon, also known as Benjamin Thornton, aforementioned as a known Alphonso Lee associate. Narcotics dealings have averaged seven per day in one ounce quantities for approximately $300.00 per ounce for mixed heroin. Orders for narcotics are telephoned to Thurmon; he then leaves his apartment and makes deliveries. In addition, the intercept, surveillances, and other source information further indicate that Alphonso Lee continues to deal in narcotics and that the telephone numbers 244-7027 and 244-7054 listed to Mrs. Teri A. Lee, 5195 Linnean Terrace, Northwest, Washington, D. C. continue to be used in Lee's narcotic operation. The following is a digest of this recent information:

A) On January 25, 1970, Alphonso Lee called Bernis Thurmon at 483-2948 and asked Bernis to send his gun over to him (A1). Bernis replied that he did not want to be "by there" to see him. Alphonso stated that Bernis owed him $300; Bernis claimed it was only $150.

B) On January 26, 1970, Geneva Thornton called "Ben" on two occasions at 244-7027, one of Alphonso Lee's numbers. "Ben" mentioned during the second call that another party was on the "5-4" number.

C) On January 28, 1970, an unidentified male called Bernis at 483-2948 and discussed money and narcotics. Bernis expressed a desire to get his money straightened out.

D) On January 29, 1970, at 1:18 p.m. officers of the Metropolitan Police Department observed a 1970 yellow Dodge Charger proceed to 1230 - 13th Street, N.W., driven by Alphonso Lee. Alphonso Lee, the only occupant, was seen to get out of the car and go to a public phone booth where he appeared to place a call. He returned to his car, and shortly thereafter a Negro male came out of 1230 - 13th Street, Northwest, and entered the same auto and conversed with Alphonso Lee. Then the Negro male left the car and went back into 1230 - 13th Street, N.W. Alphonso Lee then drove to and had conversations with a number of Negro males who came to his car. The vicinity of 14th and S Streets, Northwest is a known area of high narcotic violation in the District of Columbia.

E) On January 29, 1970, at approximately 4:13 p.m. Bernis called an unidentified male at 638-2521. The male told Bernis to come over in about 10 - 15 minutes, they would meet "down" (stairs).

F) On January 29, 1970, at about 4:25 p.m. officers of the Metropolitan Police Department began surveillance at 1230 - 13th Street, Northwest. At about 4:30 p.m. a blue, late-model Lincoln with two occupants was observed parked in an alley next to 1230 - 13th Street, Northwest. The subject Bernis Lee Thurmon has been previously observed driving an automobile of this description. An officer approached the parked automobile and observed Thurmon seated in the drivers seat and a Negro male in the front passenger seat. The two men were seen transferring a bundle of money, approximately four inches high, bills wrapped with rubber bands or string. After the transfer, the subject in the passenger seat was seen leave the Lincoln and enter 1230 - 13th Street, Northwest, where he boarded an elevator. An officer who conducted the surveillance of Alphonso Lee earlier in the day conducted this second surveillance and identified the Negro male who met with Thurmon as the same one who had earlier met with Lee.

G) In addition to the above conversations and surveillances, SE 54 states on at least one occasion since Alphonso Lee has been released from the hospital, Alphonso Lee arranged a sale of narcotics over telephone number 244-7054. SE 54 was present when this transaction was arranged.

H) A different source of information who has provided information in the past which has led to the recovery of narcotics on over five occasions states that it has personal knowledge that Alphonso Lee has continued to deal in narcotics both during his stay at Freedman's Hospital, and since his release. The source described "Bernie," Bernis Thurmon, as Alphonso Lee's delivery man.

13. Surveillance of Alphonso H. Lee, also known as "Al" and his associates reflects that he is an extremely cautious and apprehensive violator. He varies his pattern of activities though he does make regular use of the phones at 5195 Linnean Terrace, Northwest. When driving on his motorcycle he is constantly alert for surveillance.

14. Although telephone toll records have been obtained for the telephones at his base of operations, it is believed that many of "Al's" arrangements are conducted through local telephone calls which would not be noted on the subpoenaed records.

15. In spite of intense surveillance of "Al" and his associates, investigators have been unable to uncover the source of supply for the narcotics operation in the District of

Columbia. All normal investigative procedures have been used but none appears reasonably likely to succeed in identifying the source and uncovering the details sought.

16. I have not, nor has anyone to my knowledge made any application for authorization to intercept wire or oral communications from the above-described premises or from any other facilities in connection with this investigation, with the exception of the aforementioned court authorized intercept of telephone number 483-2948.

WHEREFORE, your affiant believes that probable cause exists to believe that Alphonso H. Lee, also known as "Al" and other identified and unidentified persons, are engaged in the commission of an offense involving the importation of narcotics and conspiracy to do so; that Alphonso H. Lee operates at 5195 Linnean Terrace, Northwest, Washington, D. C. in this District and within the jurisdiction of this Court; that he and other persons have used and will continue to use the telephones numbered 244-7054 and 244-7027 at this address, in connection with the commission of this offense; that further communications concerning this offense will be made over these telephone facilities; and that no other investigative procedure reasonably appears likely to succeed.

On the basis of this affidavit the affiant herewith requests this Court to issue an order pursuant to Section 2518 of Title 18, United States Code, authorizing Special Agents of the Bureau of Narcotics and Dangerous Drugs of the United States Department of Justice to install a pen register, dialing recorder and to intercept wire communications from the numbers 244-7054 and 244-7027 at 5195 Linnean Terrace, Northwest, Washington, D. C., for a period of twenty (20) days from the effective date of the order.

GLENNON L. COOPER, Special Agent
Bureau of Narcotics and
Dangerous Drugs
Washington, D. C.

Subscribed and sworn to before me
this ..... day of

UNITED STATES DISTRICT COURT
OF THE DISTRICT OF COLUMBIA

APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS	No.

ORDER

AUTHORIZING INTERCEPTION OF WIRE COMMUNICATIONS

TO: Special Agents of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice

This matter having come on before the Court upon sworn application of the United States through its attorneys, the United States Attorney Thomas A. Flannery and Assistant United States Attorney Harold J. Sullivan and one Glennon L. Cooper, a Special Agent, Bureau of Narcotics and Dangerous Drugs, Department of Justice, investigative and law enforcement officers as defined in Section 2510(7) of Title 18, United States Code, for an order authorizing the interception of wire communications pursuant to Section 2518 of Title 18, United States Code, and full consideration having been given to the matters set forth therein, the Court finds:

(a) there is probable cause to believe that Alphonso H. Lee, also known as "Al," and unknown others have committed, are committing, and are about to commit offenses involving the importation and sale of narcotics, in violation of 21 U.S.C. 174 and are conspiring to commit the aforesaid offenses in violation of 18 U.S.C. 371.

(b) there is probable cause to believe that wire communications of Alphonso H. Lee, also known as "Al," and unknown others, concerning those offenses will be obtained through the interception of wire communications. In particular, these wire communications will be between Alphonso H. Lee and his suppliers concerning: (1) the date, time, place, and manner in which illegal narcotic drugs will be delivered to Alphonso H. Lee, and (2) the price Alphonso H. Lee is

to pay for the illegal narcotic drugs and the date, time, place, and manner of payment for said drugs. Also, these wire communications will be between Alphonso H. Lee and his buyers concerning: (1) the date, time, place, and manner in which Alphonso H. Lee will deliver illegal narcotic drugs or cause illegal narcotic drugs to be delivered to his buyers and (2) the price Alphonso H. Lee is to receive for the narcotic drugs, and the date, time, place, and manner of payment for said drugs.

(c) normal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used.

(d) there is probable cause to believe that the two telephones subscribed to by one Teri A. Lee at 5195 Linnean Terrace, Northwest, Washintgon, D. C., a private residence, and carrying the telephone numbers 244-7027 and 244-7054, respectively, are being used and will be used in connection with the commission of the offenses described above and are commonly used by Alphonso H. Lee, also known as "Al."

WHEREFORE, it is hereby ordered that:

Special Agents of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice, are authorized, pursuant to application authorized by the Assistant Attorney General for the Criminal Division of the Department of Justice, the Honorable Will Wilson, who has been specially designated in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, to exercise the powers conferred on the Attorney General by Section 2516 of Title 18, United States Code, to:

(a) intercept wire communications of Alphonso H. Lee, also known as "Al," and unknown others concerning the above-described offenses to and from the two telephones subscribed to by Teri A. Lee and located at 5195 Linnean Terrace, Northwest, Washington, D. C. a private residence, and bearing telephone numbers 244-7027 and 244-7054, respectively.

(b) such interceptions shall not automatically terminate when the type of communications described above in paragraph (b) have first been obtained, but shall continue until communications are intercepted which

reveal the details of the scheme which has been used by Alphonso H. Lee and unknown others to transport, receive, conceal, and sell illegal narcotic drugs, and the identities of his confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of twenty (20) days from the date of this order, whichever is earlier.

PROVIDING THAT, this authorization to intercept wire communications shall be exectued as soon as practicable after signing of this Order and shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Chapter 119 of Title 18 of the United States Code, and must terminate upon attainment of the authorized objective, or, in any event, at the end of twenty (20) days from the date of this Order.

PROVIDING ALSO, that Harold J. Sullivan shall provide the court with a report on the 5th, 10th, and 15th day following the date of this Order showing what progress has been made toward achievement of the authorized objective and the need for continued interception.

/s/John Lewis Smith, Jr.
Judge

Date: 2/4/70

UNITED STATES GOVERNMENT DEPARTMENT OF JUSTICE

Memorandum

TO : Judge John Lewis Smith
United States District Court
for the District of Columbia

DATE: Feb. 8, 1970

FROM : Harold J. Sullivan
Chief, Major Crimes Unit

SUBJECT: Intercept of January 24, 1970

Between February 2, 1970, at 8:00 a.m. and February 7, 1970, at 8:00 a.m. the following developments occurred in connection with the intercept at 1425 N Street, Northwest, Apartment 603:

During the period from 8:00 a.m. February 2, 1970, through 8:00 a.m. February 3, 1970, a total of 13 calls were intercepted. Of these 13 calls, 8 were either related to narcotics or to the alleged conspiracy.

During the period from 8:00 a.m. February 3 through 8:00 a.m. February 4, a total of 15 conversations were intercepted. Six of these conversations concerned narcotics or narcotic transactions.

During the period from 8:00 a.m. February 4, until 8:00 a.m. February 5, a total of 17 conversations were intercepted. Seven of these conversations concerned narcotics or narcotic transactions.

During the period from 8:00 a.m. on February 5 until 8:00 a.m. February 6, a total of 6 calls were intercepted. Three of these conversations concerned narcotics or narcotic transactions.

During the period from February 6 at 8:00 a.m. until 8:00 a.m. February 7 a total of 21 conversations were intercepted. Seven of these conversations concerned narcotics or narcotic transactions.

It should be noted that on February 3 at 1:16 p.m. a male who identified himself as Norman called Bernie and asked if he could get one. Bernie said that he would meet Norman at the joint. Shortly thereafter, officer West of the MPD observed Bernie meet an unknown Negro male in the Fantasy Restaurant, 1355 U Street, Northwest. Both subjects went into the men's room at the Fantasy and were observed leaving about two minutes later.

Also, on February 3 at 10:06 p.m., a female who identified herself as Grace called Bernie and during their conversation stated that she had a friend who had a thing which would take ten (slang for dilution of narcotics) for $1,000. She said she had not called Bernie before because she did not think that he was on his own. Bernie replied that he was on his own. She asked how Al was doing.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS	APPLICATION

HAROLD J. SULLIVAN, an Assistant United States Attorney for the District of Columbia being duly sworn states:

1. This sworn application is submitted in support of a request for an extension of the order of January 24, 1970, authorizing the interception of wire communications at 1425 N Street, N. W., Apartment 603, Washington, D. C., telephone number 483-2948. This application has been submitted only after lengthy discussion concerning the necessity for such an application with various officials of the Organized Crime and Racketeering Section, Department of Justice, Washington, D. C., together with agents of the Bureau of Narcotics and Dangerous Drugs, and members of the Metropolitan Police Department.

2. He is an "investigative or law enforcement officer—of the United States" within the meaning of Section 2510(7) of Title 18, United States Code—that is, he is an attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in Section 2516 of Title 18, United States Code.

3. Pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable John N. Mitchell, has specially designated in this proceeding the Assistant Attorney General for the Criminal Division, the Honorable Will Wilson, to authorize affiant to make application for an order authorizing the interception of wire communications. The letter of authorization signed by the Assistant Attorney General is attached to this application as Exhibit A.

4. This application seeks an extension of the order of January 24, 1970, authorizing the interception of wire communications of Bernis Lee Thurmon and others concerning

offenses enumerated in Section 2516 of Title 18, United States Code—that is, offenses involving the importation and sale of narcotics in violation of Section 174 of Title 21, and Section 371 of Title 18, United States Code, which are being committed by Alphonso H. Lee, Bernis Lee Thurmon, and others.

5. He has discussed all the circumstances of these offenses with Special Agent Glennon L. Cooper of the District of Columbia Office of the Bureau of Narcotics and Dangerous Drugs who is fully familiar with the investigation herein and has sworn to the affidavit attached to this application as Exhibit B, which alleges the facts contained in the following paragraphs in order to show that:

(a) there is probable cause to believe that Alphonso H. Lee, Bernis Lee Thurmon, and others are conspiring to commit, are committing, and are about to commit offenses involving the importation and sale of narcotics.

(b) there is probable cause to believe that wire communications concerning those offenses will be obtained through the interception, authorization for which is applied for herein. In particular, these wire communications will concern the details of the scheme used to smuggle narcotics into the United States, the method of delivery of these narcotic drugs to this area, and the participants and the nature of the conspiracy involved therein.

(c) normal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used.

(d) there is probable cause to belive that the telephone subscribed to by one Geneva Thornton at Apartment 603, 1425 N Street, N. W., Washington, D. C., carrying the telephone number 483-2948 is being used and will be used in connection with the commission of the offenses described above and is commonly used by Bernis Lee Thurmon.

6. On January 24, 1970, Judge John Lewis Smith, United States District Judge, District of Columbia, issued an order authorizing the interception of wire communications for a twenty (20) day period to and from telephone number 483-2948 located at 1425 N Street, N. W., Apartment 603, Washington, D. C. This is the telephone facility for which the

extension is requested. On February 4, 1970, Judge John Lewis Smith issued an order authorizing the interception of wire communications for a twenty (20) day period to and from telephone numbers 244-7027 and 244-8054 subscribed to by Teri A. Lee and located at 5195 Linnean Terrace, N. W., Washington, D. C. No other applications have been made to any judge for authorization to intercept or for approval of interception of wire or oral communications involving any of the same persons, telephones, or places specified herein.

WHEREFORE, your affiant believes that probable cause exists to believe that Bernis Lee Thurmon and others, are engaged in the commission of offenses involving the importation and sale of narcotics, that they have used, are using, and will use the telephone located at Apartment 603, 1425 N Street, N. W., Washington, D. C., in connection with the commission of these offenses, that communications concerning those offenses will be intercepted from that telephone and that no other investigative procedure appears likely to succeed.

On the basis of the allegations contained in this application and on the basis of the affidavit attached, affiant herewith requests this court to issue an order, pursuant to the power conferred on it by Section 2518 of Title 18, United States Code, authorizing the Bureau of Narcotics and Dangerous Drugs of the United States Department of Justice to continue to intercept wire communications from the above-described telephone until communications are intercepted which reveal the details of the scheme which has been used to smuggle narcotics into the United States, the method of delivery of these narcotic drugs to this area, the sale of these narcotic drugs in this area, and the participants and the nature of the conspiracy involved therein, or for a period of eleven (11) days from the date of that order, whichever is earlier.

/s/ Harold J. Sullivan
HAROLD J. SULLIVAN
Assistant United States Attorney
Washington, D. C.

Subscribed and sworn to before me
this 10th day of January, 1970.

/s/ John Lewis Smith, Jr.
United States District Judge

AFFIDAVIT

1. I am a Special Agent of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice. I am participating in and fully familiar with the investigation pending in our Bureau and the Narcotics Section of the Metropolitan Police Department of the narcotic wholesale trafficking activities of Alphonso H. Lee, also known as "Al," Bernis Lee Thurmon, also known as Benjamin Thornton, Frank Scott, also known as "Red," Gordie King, Irving Hendricks, Donald L. Brown, Bneajmin H. Corbin, and unknowns including John Doe, a "silent partner" in the conspiracy to be described.

2. This application is submitted for an extension of the Order by this Court on January 24, 1970, authorizing the interception of wire communications at 1425 N Street, Northwest, Apartment 603, Washington, D. C., telephone number 483-2948, through February 13, 1970. The period of time for which the extension is requested is eleven (11) days until February 23, 1970, to coincide with the termination of the order of the Court, authorizing the interception of wire communications from the telephone numbers 244-7054 and 244-7027, listed to Teri A. Lee, in connection with the same alleged conspiracy. The type of communications sought to be intercepted pursuant to the above orders are conversations among individuals in New York, New Jersey, Philadelphia, Virginia and Washington which will reveal the details of a scheme used to smuggle narcotics into the United States, transport such narcotics into the Washington, D. C. area and distribute them in this area. The type of communications sought to be intercepted during the period of extension, if it is granted, are the same as above with particular emphasis upon conversations which are expected to provide a more complete identification of the principals involved in the conspiracy to import the narcotics into the United States and transport them to the District of Columbia, their precise roles in the conspiracy and the method by which the narcotics are actually brought into the District. The period for which interception has been presently approved is twenty days from January 24, 1970, or upon attainment of the authorized objective whichever first occurs. The authorized objectives have not yet been obtained and the twenty day period expires on Friday, February 13, 1970.

3. The principal subjects in this investigation are:

A. Alphonso H. Lee, also known as "Al," a Negro male, born on April 18, 1936. He has a light rough complexion and often wears a yellow colored bandana with black markings. He is 5'6" tall and weighs 150 pounds. He lives at 5195 Linnean Terrace, N.W. He rides a motorcycle bearing current D. C. license M 2806.

B. Bernis Lee Thurmon, also known as Benjamin Thornton, a Negro male, born May 29, 1933. He is 5'11" tall and weighs 165 pounds. He resides at 1425 N Street, N.W., Apt. 603. Thurmon is known to the Metropolitan Police Department I. D. Bureau as #190 647 and to the Federal Bureau of Investigation as #753 570D. Thurmon was arrested on January 26, 1962 and May 4, 1967 and charged with possession of narcotics in violation of the Uniform Narcotics Act.

C. Frank Ricardo Scott, also known as "Red," a Negro male known to the Metropolitan Police Department I. D. Bureau by #142 069. He was born on November 23, 1915. Scott was arrested on July 7, 1962, and charged with violation of the Uniform Narcotics Act. He was arrested on February 21 and May 7, 1962, and charged with violation of the Harrison Narcotics Act. He was also arrested on April 29, 1959, for violation of the Dangerous Drug Act. Furthermore, Scott was indicted on October 8, 1963, for violation of the Harrison Narcotic Act and sentenced on January 20, 1964, for six months to ten years.

D. John Doe, the silent partner who is believed to be the kingpin of the Washington end of the conspiracy.

E. Gordon Roger King, a Negro male, born January 23, 1933. He is 5'10½" tall and weighs 172 pounds. He resides at 3839 Nash Street, Southeast, Washington, D. C.

F. Irving Allen Hendricks, also known as "Sweetyman," Negro male, born December 26, 1920, at Baltimore, Maryland. Present address, 256 Illinois Avenue, Atlantic City, New Jersey. Federal Bureau of Investigation #622 516B, Bureau of Narcotics and Dangerous Drugs #D 690 148. Hendricks was arrested in Atlantic City, New Jersey on December 18, 1969, and charged with possession of narcotics.

G. Donald Leonard Brown, a Negro male, born on March 27, 1927, at Atlantic City, New Jersey, Federal Bureau of Investigation #376 12881, Bureau of Narcotics and Dangerous Drugs #D 690 149.

On November 27, 1969, Brown was arrested by local authorities in Atlantic City, New Jersey. He had eight

ounces of heroin and two ounces of cocaine in his possession at the time of his arrest. Previously, Brown had been arrested on August 28, 1956, in Newark, New Jersey and charged with violation of Federal Narcotics Laws. He was sentenced to five years in prison on September 2, 1956. Brown was also arrested in Atlantic City, New Jersey on September 16, 1969, and charged with Possession of Narcotics, Possession of Prescription Drugs and Possession of Stolen Property.

H. Benjamin Harrison Corbin, also known as "Flabby," a Negro male born August 24, 1916, at Baltimore, Maryland. Present residence: 2337 Edmonson Avenue, Baltimore, Maryland. United States Passport #D-001122. He is a former merchant seaman who has made trips to Ecuador and Peru which have been verified. His Federal Bureau of Investigation identification number is #449-9854.

I. LeRoy Houston, also known as "Big Boy," a Negro male born on June 25, 1927. He is 6'3" tall and 190 pounds and has a dark complexion. His Metropolitan Police Department identification number is #105 591. Houston was arrested on August 4, 1969, for violation of the Harrison Narcotic Act.

4. Bernis Thurmon has been the subject of a continuing investigation by the Metropolitan Police Department since September, 1969, and by the Bureau of Narcotics and Dangerous Drugs since December, 1969.

A special employee of the Bureau of Narcotics and Dangerous Drugs whose information has been checked and verified on numerous occasions by agents of the Bureau of Narcotics and Dangerous Drugs has informed agents of the Bureau of Narcotics and Dangerous Drugs in the Philadelphia area that Donald Leonard Brown has been buying heroin and cocaine for resale in the United States. A check of passport records indicates that on September 24, 1966, Corbin renewed his passport for the purpose of travelling to Ecuador. Agents of the Bureau of Narcotics and Dangerous Drugs determined by interviewing a Flight Agent of Lufthansa that Corbin did in fact leave the United States for Ecuador. Prior to this time on July 28, 1966, agents of the Bureau of Narcotics and Dangerous Drugs observed Corbin disembark from South America.

In July, 1969, Detective Poggi was told by an informant hereafter known as SE 175 that Frank Scott, also known as "Red" Scott was dealing in narcotics inside the Fantasy Restaurant and was obtaining said drugs from the person

who was running the Fantasy Restaurant. SE 175 told Detective Poggi that "Red" Scott had travelled to Puerto Rico on at least one occasion. SE 175 later identified a photograph of Gordon Roger King as the man from whom Scott was receiving narcotics. Records of the Alcohol Beverage Commission reveal that one Gordon Roger King is the Secretary of K. C. Corporation trading as the Fantasy Restaurant.

5. An informant hereafter referred to as SE 54 has advised that the subject "Al" has informed him that he is from New York and came to the District of Columbia area about twelve years ago at which time he went into the illicit narcotic business. "Al" has told SE 54 that although he has been in the illicit narcotics business for many years he has never been apprehended. He attributes this to skillful management of his operation. This operation, according to SE 54, involves great care in selecting purchasers and sellers of narcotics, frequent changes in meeting places, and the use of motorcycles by messengers for deliveries to avoid surveillance by law enforcement officers. SE 54 has participated in conversations with associates of "Al" in which these associates have described the methods by which narcotics are flown from New York into Dulles Airport where they are picked up by "Al's" operators and stashed at a certain place in Virginia.

SE 54 has advised that he became involved in narcotic drug traffic more than a year ago at which time he met the subject known to him as "Al." SE 54 became an employee of said "Al" and was soon selling about several hundred dollars worth of heroin per day. According to SE 54 "Al" brought its orders of narcotics to a location in the vicinity of the Fantasy near 14th and U Streets, N.W., Washington, D. C. On several occasions when SE 54 was picking up its package of narcotics it observed numerous other packages of narcotics upon which were written the names of different persons. Sinse the narcotics "bust" on August 18, 1969, which resulted in the arrest of approximately 40 persons, "Al" has changed his place of delivery and currently delivers to SE 54 at a location in Northwest Washington, hereinafter referred to as location D. In describing the magnitude of "Al's" operation, SE 54 has stated that "Al" as part of his continuing narcotics operation manages the narcotics business of the above-described Frank Scott, also known as "Red" when Scott is out of the country. Furthermore, "Al" has told SE 54 that he frequently goes to New

York and Virginia to engage in narcotics transactions. SE 54 has told Detective Merritt that "Al" had told it that he and Gordon King, the owner of Gordies Liquors at 14th and U Street, N.W., Washington, D. C., and owner of the Fantasy Restaurant were "partners." SE 54 further stated that he had contacted a Negro female bartender at the Fantasy Restaurant, known to him as Bernice, for the purpose of setting up a narcotics transaction with "Al." Records of the Alcoholic Beverage Commission reveal that the sole owner of National Liquors, commonly referred to as Gordies Liquors, at 2001 14th Street, N.W., Washington, D. C., is one Gordon King. Alcoholic Beverage Commission records further indicate that one Bernice Davis, a Negro female, born on May 4, 1933, is a licensed manager of the Fantasy Restaurant. Members of both the Bureau of Narcotics and Dangerous Drugs and Metropolitan Police Department Narcotics Section have made undercover buys of narcotics in the Fantasy Restaurant. SE 54 states that "Al" is the principal lieutenant to Scott and is in charge of all narcotic dealing in the area of 12th and U Streets, N.W., Washington, D. C. SE 54 also states that there is a silent partner who is the top man in the operation. All means of investigation employed so far have failed to reveal the identity of this silent partner. SE 54 also states that Scott and "Al" have their own factory where they "cut" pure heroin. He has seen "Al" on one occasion carrying a bag containing more than three kilos of white powder which "Al" said was pure heroin. All means of investigation employed so far have failed to reveal the location of this factory.

6. The above informant has further advised that "Al" is one of the largest dealers of narcotics in the Washington, D. C. area, and that informant's services could assist in initiating a case against "Al." The above informant's reliability has been proven in the past. Specifically, on two occasions, his information has directly resulted in arrests of subjects for violation of the Harrison Narcotics Act. Other information concerning narcotics traffic in Washington from SE 54 has been checked and verified by members of the Metropolitan Police Department.

7. On or about September 3, 1969, SE 54 told Officer William J. Merritt of the Narcotic Section of the Metropolitan Police Department that it could arrange to buy narcotics from "Al." SE 54 further stated that it could

make such arrangements by calling the telephone number 244-7054.

On or about September 11, 1969, SE 54 called the above number and spoke to "Al" and arranged to have a wholesale quantity of heroin delivered to it at Location D. This call was monitored by Detective Merritt with the permission of SE 54.

A surveillance was placed on 5195 Linnean Terrace, N.W., and at about 6:20 p.m. the officers conducting the surveillance observed a Negro male leave the above premises riding a motorcycle (D. C. Tags M 2806). D. C. Tag M 2806 is listed to Benjamin Thornton of 1425 N Street, N.W., Apartment 603. It will be recalled that "Benjamin Thornton" is an alias used by Bernis Lee Thurmon described above. At about 6:25 p.m. the same Negro male arrived at Location D and sold the previously agreed upon wholesale quantity of heroin to SE 54. The person selling the heroin was identified by SE 54 as "Al." This sale was observed by Detective Merritt. The chemist's analysis showed that the package sold to SE 54 contained 6.2 per cent pure heroin.

8. On or about Wednesday, September 17, 1969, SE 54 again dialed 244-7054, in the presence of Detective G. A. Brandani, who monitored the call with SE 54's permission. "Al" answered the phone and received SE 54's order for another wholesale quantity of heroin. "Al" told SE 54 to proceed to the same location D. At 11:28 a.m. the officer conducting surveillance of the Linnean Terrace, N.W. address observed two motorcycles leave from the rear of the Linnean Terrace, N.W. address. At approximately 12:25 p.m. on the same day, Detective Tribby who was conducting surveillance at Location D observed two motorcycles arrive. Thereafter SE 54 purchased the previously agreed upon wholesale qauntity of 7.2 per cent pure heroin from the subjects. SE 54 later identified the Negro male operating the motorcycle bearing D. C. Tags M 2806 as "Al." He also later identified the other Negro male by photograph as "Al's" right hand man, Bernis Lee Thurman, Police Department I. D. Bureau #190-647. Thurmon has been identified by the resident manager of 1425 N Street N.W., as the same person she knows as Benjamin Thornton, who rents Apartment 603 at that address. Benjamin Thornton is the subject to whom motorcycle M 2806 is listed which motorcycle is operated by "Al."

9. On the morning of December 17, 1969, Detectives

Robert Tribby and Gabriel Brandani observed a late model automobile, District of Columbia Tag #748-879 arrive at 5195 Linnean Terrace, N.W. A white male departed from the car and delivered a package to a Negro male at 5195 Linnean Terrace, N.W. A photograph was taken by the detectives and the male who received the package was later identified by SE 54 from the photograph as "Al." Investigation revealed that the late model automobile described above is registered to D&M Corporation, T. L. Higgers Drugs, 5015 Connecticut Avenue, N.W. The pharmacist at Higgers Drugs informed Detective McKennon that a delivery of two pounds of "lactose" otherwise known as milk sugar, had been made to 5195 Linnean Terrace, N.W., on the morning of December 17, 1969, pursuant to a request from a Mrs. Lee. The pharmacist stated that this was an uncommon request and that he had to order the product specially for Mrs. Lee. "Lactose" is a product commonly used to dilute pure heroin. Two pounds of lactose could be used to "cut" pure heroin into 17,000 capsules for street sale.

10. Further information has been received by Detectives Merritt and Poggi of the Metropolitan Police Department from Special Employee #144, an informant whose information has contributed to the arrests of narcotics violators, that said Special Employee has purchased heroin and cocaine from a man named "Bernie," who lives at 1425 N Street, N.W., Apartment 603. Said Special Employee has identified a photograph of Bernis Lee Thurmon as the "Bernie" who lives at 1425 N Street, N.W. SE 144 has informed Detectives Merritt and Poggi that "Bernie" keeps hundreds of capsules of heroin on his person for customers who come to his apartment, and that he and an associate named "Al" frequently operate motorcycles. SE 144 has told members of the Metropolitan Police Department that "Al" and one Gordie King are two of the biggest narcotic traffickers in the District of Columbia. According to SE 144, King travels to Puerto Rico and Bahamas. King told SE 144 that on one of his trips he gave a party at which he supplied several thousand dollars worth of cocaine. SE 144 does not know where "Al" obtains his narcotics but thinks that he transacts at least some of his business in Atlantic City, New Jersey. "Al" told SE 144 that he had wrecked his automobile in Atlantic City in mid-November. This same information regarding the wrecked automobile had previously been received from SE 54.

The subjects "Al" and Thurmon have been observed on

numerous occasions by members of the Metropolitan Police Department, Narcotic Section, at 1425 N Street, N.W., and also at 5195 Linnean Terrace, N.W.

11. Records of the C & P Telephone Company obtained by subpoena indicate that the above 202-244-7027 was used on May 22, 23, 27, 28, June 1, 19, 24, July 9, and 26, 1969, to call the number 609-345-6968, in Atlantic City, New Jersey, listed to Valerie Hendricks, 256 North Illinois Avenue, Atlantic City, New Jersey. Further records from the telephone company reflect that the above phone 609-345-6968 was used to call the telephone 202-244-7054 at 5195 Linnean Terrace on July 29, and August 11, 1969. Records also reflect that the Hendricks' phone was used to call the telephone number 301-233-5383, listed to Benjamin Harrison Corbin at Baltimore, Maryland. Toll records further reflect that Donald Leonard Brown has made numerous long distance telephone calls to Dallas, New York, and Philadelphia.

On November 19 and 21 and on December 10, 1969, the telephone number 244-7027, was used to call the number 609-345-7332, in Atlantic City, New Jersey. This number is listed to Ike's Liquor Store, which is owned by Isaac Boswell Nicholson, described by the Federal Bureau of Investigation as the "number two man" in the numbers racket in Atlantic City. Nicholson has been arrested on numerous occasions for gambling violations.

On November 19, 1969, the telephone number 244-7027 was twice used to call the number 609-344-1657, which is listed to Frank Stewart, described by the Federal Bureau of Investigation as being involved in narcotics, prostitution and gambling. Stewart owns a bar which, according to the Federal Bureau of Investigation, is used for illegal narcotic transactions.

On November 31, December 8, and 10, 1969, the number 244-7027 was used to call the number 609-344-5919 listed in the Atlantic City, New Jersey, directory to Mamie Jones. The sister of Mamie Jones is one "Toody" Kirkland alleged to be a member of the Kirkland Brothers gang which, according to the Federal Bureau of Investigation, is involved in narcotics, gambling, and other criminal activities. The Federal Bureau of Investigation also reports that Mamie Jones is an associate of Maynard Francis Hayes, a suspected forger and narcotics violator. The number 609-344-5919 was also called from the number 244-7054 on November 26, 1969.

On November 5, 1969, Alphonso Lee was involved in an automobile accident in Atlantic City. According to the New Jersey State Police accident report the car he was driving was a 1969 Dodge bearing D. C. Tags #722-886, registered to Richard L. Scott. According to the report of William J. Long, a trooper of the New Jersey State Police, at the time of the accident Lee had $2,000.00 in cash in his possession. Observations by Detectives Merritt and Poggi indicate that the automobile bearing D. C. Tags #722-886 is presently parked on the garage lot in the 1800 block of 14th Street, N. W., in a wrecked condition.

10. Surveillance of Alphonso H. Lee, also known as "Al" and his associates reflects that he is an extremely cautious and apprehensive violator. He varies his pattern of activities though he does make regular use of the phones at 5195 Linnean Terrace, N. W. When driving on his motorcycle he is constantly alert for surveillance.

10a. On January 12, 1970, Alphonso H. Lee was shot in the leg. Shortly thereafter SE 54 learned that Mrs. Teri A. Lee had temporarily taken over the management of "Al's" business and that for the time being SE 54 should make his orders by calling the number 483-2948. The subscriber is listed as Geneva Thornton at 1425 N Street, Northwest, Apartment #603. After learning this SE 54 called the above number and spoke with Bernis Lee Thurmon, a/k/a Benjamin Thornton. SE 54 ordered a large quantity of narcotics from Thurmon which was delivered to it in the Northwest section of the District of Columbia.

11. Although telephone toll records have been obtained for the telephones at his base of operations, it is believed that many of "Al's" arrangements are conducted through local telephone calls which would not be noted on the subpoenaed records.

12. In spite of intense surveillance of "Al" and his associates, investigators have been unable to uncover the source of supply for the narcotics operation in the District of Columbia. All normal investigative procedures have been used but none appears reasonably likely to succeed in identifying the source and uncovering the details sought.

13. On January 26, 1970, the Court entered an order authorizing the interception of telephone communications to and from number 483-2948 at 1425 N Street, N.W., Apartment 603, Washington, D. C. The intercept was connected on January 24, at 8:00 p.m. and has continued through the present time. Throughout, I have been and

continue to be the supervisory agent for the detail. All incoming and outgoing calls have been monitored and recorded. In my capacity as supervisory agent, I have personally monitored or have listened to the tape recordings of the conversations intercepted pursuant to the Order of January 24, 1970, set forth below.

14. From 1:45 p.m. on January 25, 1970, until 8:00 a.m. on February 10, there have been 294 telephone calls to and from the telephone of Bernis Thurmon, 483-2948. Of these 294 calls, a total of 125 conversations dealt in specific terms with traffic in narcotics concerning sale, delivery, strength, and purchase price.

15. As of 8:00 a.m. on February 10, 1970, nine local individuals which the intercept indicates are major violators have been identified. Probable cause now exists to make application to obtain arrest warrants for these nine individuals. Thirteen other large-scale violators have not yet been fully identified. Numerous other callers who have ordered narcotics or spoken about narcotics transactions have not yet been identified in any way. Thus far, seventeen locations where narcotics are likely to be stored have been discovered. Of these seventeen, probable cause presently exists to make application for a maximum of six places. Extension of the intercept for the projected period can be expected to result in identification of many more narcotic violators and storage points for narcotics in the Washington, D. C. area, and the strengthening of probable cause for arrests, searches and seizures and prosecutions.

16. As of this date agents of the Bureau of Narcotics and Dangerous Drugs have confirmed by surveillance more than twenty narcotic transactions arranged over this telephone where surveillance was possible. Surveillances were possible only because of information gained from the interception itself, and from the opportunity to direct surveillance resources to a particular scene at a particular time. For instance, Bernis Thurmon has been observed on almost each sortie to stop at a location on 15th Street, Northwest, believed to be the location of his stache of narcotics, prior to proceeding to the rendezvous with customers who have just made orders by telephone. He has subsequently been observed on separate occasions to proceed to the known addresses of seven identified narcotics dealers, whom the intercept reveals he is supplying. He has also been observed delivering to other customers in parking lots, on street corners and at the Fantasy Restaurant. The intercept reveals that all of the transactions arranged by Bernis Thurmon are in increments of $25.00 quantities, with orders up to $800.00 per delivery.

17. The intercept at 1425 N Street, Northwest, and related investigation has confirmed the close working relationship, between Alphonso Lee and Bernis Thurmon, described in earlier affidavits:

1) On January 25, 1970, Alphonso Lee called Bernis Thurmon at 483-2948 and asked Bernis to send his gun over to him (Al). Bernis replied that he did not want to be "by there" to see him. Alphonso stated that Bernis owed him $300.00; Bernis claimed it was only $150.00.

3) On January 29, 1970, at 1:18 p.m. officers of the Metropolitan Police Department observed a 1970 yellow Dodge Charger proceed to 1230 13th Street, Northwest, driven by Alphonso Lee. Alphonso Lee, the only occupant, was seen to get out of the car and go to a public phone booth where he appeared to place a call. He returned to his car, and shortly thereafter a Negro male came out of 1230 13th Street, Northwest, and entered the same auto and conversed with Alphonso Lee. Then the Negro male left the car and went back into 1230 13th Street, Northwest. Alphonso Lee then drove to the vicinity of 14th and S Streets, Northwest, where he stopped and had conversations with a number of Negro males who came to his car. The vicinity of 14th and S Streets, Northwest is a known area of high narcotic violation in the District of Columbia.

4) On January 29, 1970, at approximately 4:13 p.m. Bernis called an unidentified male at 638-2521. The male told Bernis to come over in about 10 - 15 minutes, they would meet "down" (stairs).

5) On January 29, 1970, at about 4:25 p.m. officers of the Metropolitan Police Department began surveillance at 1230 13th Street, Northwest. At about 4:30 p.m. a blue, late-model Lincoln with two occupants was observed parked in an alley next to 1230 13th Street, Northwest. The subject Bernis Lee Thurmon has been previously observed driving an automobile of this description. An officer approached the parked automobile and observed Thurmon seated in the drivers seat and a Negro male in the front passenger seat. The two men were seen transferring a bundle of money, approximately four inches high, bills wrapped with rubber bands or string. After the transfer, the subject in the passenger seat was seen leave the Lincoln and enter 1230 13th Street, Northwest, where he boarded an elevator. An of-

ficer who conducted the surveillance of Alphonso Lee earlier in the day conducted this second surveillance and identified the Negro male who met with Thurmon as the same one who had earlier met with Lee.

6) A different source of information has provided information in the past, which has led to the undercover purchase of narcotics on over five occasions which purchases were surveilled by members of the Metropolitan Police Department and yielded substantial quantities of narcotics each time. This source states that during the month of January, 1970, it has heard Alphonso Lee arrange for the sale of narcotics by telephone, and that within the past ten days it has heard Lee arrange for the sale and delivery of narcotics over the telephone 244-7054. The source described "Bernie," Bernis Thurmon, as Alphonso Lee's delivery man.

7) The intercept at 483-2948, has revealed that Alphonso Lee and Bernis Thurmon have spoken to each other about narcotic transactions on numerous occasions. These conversations and others in which "Al" and "Rock Creek Al" are mentioned, indicate that Alphonso Lee is Thurmon's boss or source, and that Thurmon is a principal lieutenant for Lee.

18. As previously mentioned in paragraph 2 above, a Court order authorizing the interception of wire communications at 5195 Linnean Terrace was entered on February 4, 1970. These two intercepts and related investigation have begun to reveal the interstate sources supplying narcotics to this major local wholesaling operation:

1. On January 25, 1970, the first day that conversations were intercepted at 483-2948, Thurmon called Lee at Freedman's Hospital and told Lee that he had just returned from Delaware.

2. On January 31, 1970, Bernis Thurmon called a woman in Delaware who identified herself as Liz. She said she had been planning a trip to Washington.

3. On February 2, 1970, Liz called Bernie at 483-2948, and said she would be in Washington over the weekend. She said that she got the key and that the house was on 7th Street above Georgia Avenue.

4. On February 3, 1970, a woman who identified herself as Grace called from New York City to 483-2948 and spoke with Bernie. Grace asked if Al had gotten out of the hospital. She said that she had spoken to Liz the night before. She also said that she knew a friend of her uncle Tuson who

had a "thing that would take ten" for $1,000.00, and wanted to know if Bernie was interested.

5. On February 7, 1970, at 8:22 p.m. Terry Lee called from 244-7054 to Union Station and asked when the next train was scheduled to leave for Philadelphia. Information stated 9:50 p.m.

6. On February 8, 1970, Alphonso Lee called 483-2948 from a phone other than at 5195 Linnean Terrace, N.W., and asked Geneva if he and Bernie were still going to Baltimore. Geneva said that they were, and Al left the message to have Bernie pick Al up before he left.

7. On February 8, 1970, at 7:44 a.m. Teri Lee called from Philadelphia to 244-7054 and told Al that she would see him later.

8. On February 8, 1970, at 10:00 p.m., Teri Lee called Al at 244-7054 and said she was coming home and was trying to make arrangements for transportation. Teri spoke in disguised language about doing some "other things," and told Al that she would tell him when she got home. Al asked her if it had anything to do with something he didn't have when she left. She said not but stated that she had an appointment with the realtor on Monday.

9. On February 9, 1970, Teri Lee called Al from Philadelphia and said that she would be home that night. She said she was going to engage a subject named Ed to bring her back to the District because she needed more help with the business.

10. On February 9, 1970, at 2:42 p.m., Al called from 244-7054 to Atlantic City, New Jersey to Tootie Kirkland. They spoke about Virginia Rudy (Rufus Williams, who was arrested in the alleged Tantillo-Jackson conspiracy and later slain by an unknown assailant), and Sweetyman (an alias of Irving Allen Hendricks). Al also talked about his "business" which he said centered around the Fantasy, but which he wished to expand.

11. On February 9, 1970, at 3:03 p.m., Teri called Al from Philadelphia and warned him not to buy anything. Al said that he didn't have to buy anything because it was waiting for him. Teri told Al to leave it there and that she would explain later.

A continuing coordination of the intercepts at both addresses is expected to supply further, more specific information about the means being used by Alphonso Lee, Teri Lee and Bernis Thurmon to bring narcotics into the District of Columbia. It will lead to the identification of

out-of-town sources and will enable agents in other cities to conduct surveillances of these individuals with the local subjects of this investigation. This continuing coordination will also reveal and identify other persons and places connected with and being used in the local wholesale operation.

19. Termination of the intercept of telephone 483-2948 used by Bernis Thurmon, in advance of the termination of the interception on facilities at 5195 Linnean Terrace, Northwest, would jeopardize the success of both investigations. The intercept has confirmed the close relationship between these two key figures in the conspiracy. If the Thurmon operation were closed before that of Lee, the wave of resulting arrests and, more importantly, the seizure of narcotics by search warrants, obtained by information through the intercept and left by law on the premises, would reveal the entire investigation and the fact of the intercept to Lee, the major local target. The revelation of the intercept at 1425 N Street, Northwest would immediately alert Lee to the fact that probable cause existed for his arrest, that at least some of his operation and staches were revealed, and that his phone could well be under intercept too. To expect him to continue narcotic operation in the District in the same fashion, and over the same telephone facilities, would be fantasy. At the very least he would alter his operation, which would frustrate the efforts made to date to identify his sources, staches, and major suppliers. On the other hand, to close the Thurmon intercept and continue with the Lee intercept would forfeit the considerable fruits of the Thurmon investigation including the identification of narcotic violators and their staches. In the many anticipated search warrants based on the Thurmon intercept were not executed upon its termination, the information supporting them would be stale by the time the Lee intercept were terminated, so these important resources could not be made. In sum, the operations of Thurmon and Lee are joint, and the investigation and intercept of their illegal activities must likewise be coordinated.

20. I have not, nor has anyone to my knowledge made any application for authorization to intercept wire or oral communications from the above-described premises or from any other facilities in connection with this investigation, with the exception of the aforementioned court authorized intercept of telephone numbers 244-7054 and 244-7027.

WHEREFORE, your affiant believes that probable cause exists to believe that Bernis L. Thurmon and other identified and unidentified persons, are engaged in the commission of an offense involving the importation of narcotics and conspiracy to do so; that Alphonso H. Lee operates at 5195 Linnean Terrace, Northwest, Washington, D. C. in this District and within the jurisdiction of this Court; that affiant further believes that probable cause exists to believe that Bernis Lee Thurmon and others in the Alphonso H. Lee operation described above are engaged in the commission of an offense involving the importation of narcotics, and conspiracy to do so; that Bernis Lee Thurmon operates at 1425 N Street, Northwest, Washington, D. C. in this District and within the jurisdiction of this Court; that he has used and will continue to use the telephone numbered 483-2948 at this address, in connection with the commission of this offense; that further communications concerning this offense will be made over these telephone facilities; and that no other investigative procedure reasonably appears likely to succeed.

On the basis of this affidavit the affiant herewith requests this Court to issue an order pursuant to Section 2518 of Title 18, United States Code, extending authorization for Special Agents of the Bureau of Narcotics and Dangerous Drugs of the United States Department of Justice to intercept wire communications from the number 483-2948 at 1425 N Street, Northwest, Washington, D. C., for a period of eleven (11) days from the effective date of the order.

/s/ Glennon L. Cooper
GLENNON L. COOPER, Special Agent
Bureau of Narcotics and
Dangerous Drugs
Washington, D. C.

Subscribed and sworn to before me
this 10th day of February, 1970.

Judge John Lewis Smith

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Application of the United States of America in The Matter of an Order Authorizing The Interception of Wire Communications	No.

ORDER

AUTHORIZING CONTINUED INTERCEPTION OF WIRE COMMUNICATIONS

TO: Special Agents of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice

This matter having come on before the Court upon application of the United States through its attorneys, the United States Attorney Thomas A. Flannery and Assistant United States Attorney Harold J. Sullivan and one Glennon L. Cooper, a Special Agent, Bureau of Narcotics and Dangerous Drugs, Department of Justice, investigative or law enforcement officers as defined in Section 2510 (7) of Title 18, United States Code, for an order authorizing the interception of wire communications pursuant to Section 2518 of Title 18, United States Code, and full consideration having been given to the matters set forth therein, the Court finds:

(a) there is probable cause to believe that Bernis Lee Thurmon, a/k/a Benjamin Thornton and others, presently operating from Apartment 603, 1425 N Street, N. W., Washington, D. C., within this District, are committing and are about to commit and are conspiring with other persons to commit an offense set forth in Section 2516 of Title 18, United States Code, to wit: the importation and sale of narcotics in violation of Section 174 of Title 21 of the United States Code.

(b) there is probable cause to believe that communications concerning that offense will be obtained through the interception of wire communications. In particular, these wire communications will concern the date and the manner in which narcotic drugs will be smuggled

into the United States and the participants and the nature of the conspiracy involved therein and the delivery and illicit sale of these narcotic drugs in this jurisdiction.

(c) all normal investigative procedures have been used but none appears reasonably likely to succeed in obtaining the above information.

(d) there is probable cause to believe that the telephone located at Apartment 603, 1425 N Street, N. W., Washington, D. C., listed to Geneva Thornton and carrying the telephone number 483-2948 is being used and is about to be used in connection with the commission of the above-described offenses and is commonly used by Bernis Lee Thurmon, and others as yet unknown.

WHEREFORE, is it hereby ordered that:

Special Agents of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice, are authorized, pursuant to application authorized by the Assistant Attorney General for the Criminal Division of the Department of Justice, the Honorable Will Wilson, who has been specially designated in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, to exercise the powers conferred on him by Section 2516 of Title 18, United States Code, to:

(a) continue to intercept the wire communications of Bernis Lee Thurmon, and other persons as may make use of the telephone hereinbefore described.

(b) such interception shall not automatically terminate when the type of communication described above in paragraph (b) has first been obtained, but shall continue until communications are intercepted which reveal the details of the scheme which has been used to smuggle narcotics into the United States, and which reveal the identities of the participants involved therein, and which reveal the illicit destination and method of delivery of these narcotic drugs, and which reveal the identities of those individuals involved in the delivery thereof, or for a period of eleven (11) days from the date of this order, whichever is earlier.

PROVIDING THAT, this authorization shall be continued in such a way as to minimize the interception of communica-

tions not otherwise subject to interception under Chapter 119 of Title 18, United States Code, and must terminate upon attainment of the authorized objective, or, in any event, at the end of eleven (11) days from the date of this order.

PROVIDING ALSO, that HAROLD J. SULLIVAN shall provide the Court with a report on the 4th and 8th day following the date of this order showing what progress has been made toward achievement of the authorized objective and the need for continued interception.

John Lewis Smith, Jr.
JUDGE

Date: 2/13/70

DEPARTMENT OF JUSTICE

UNITED STATES GOVERNMENT

Memorandum

DATE: Feb. 13, 1970

To : Judge John Lewis Smith
United States District Court
for the District of Columbia

FROM : Harold J. Sullivan
Chief, Major Crimes Unit

SUBJECT : Intercept of January 24, 1970

Between February 7, 1970, at 8:00 a.m. and February 12, at 8:00 a.m. the following developments occurred in connection with the intercept at 1425 N Street, N.W., Apartment 603:

During the period from 8:00 a.m. February 7, through 8:00 a.m. February 8, a total of 18 calls were intercepted, 5 were either related to narcotics or to the alleged conspiracy.

During the period from 8:00 a.m. February 8 through 8:00 a.m. February 9, 6 conversations were intercepted. Three of these conversations concerned narcotics or narcotic transactions.

During the period from 8:00 a.m. February 9, through 8:00 a.m. February 10, 12 conversations were intercepted. Six of these conversations concerned narcotics or narcotic transactions.

During the period from 8:00 a.m. on February 10 through 8:00 a.m. on February 11, three of these conversations concerned narcotics or narcotic transactions.

During the period from 8:00 a.m., February 11, through 8:00 a.m. February 12, a total of 11 conversations were intercepted. Five of these conversations concerned narcotics or narcotic transactions.

A number of the above drug-related phone conversations resulted in narcotic deliveries which were surveilled by members of the Metropolitan Police Department.

DEPARTMENT OF JUSTICE

UNITED STATES GOVERNMENT

Memorandum

DATE: Feb. 13, 1970

TO : Judge John Lewis Smith
United States District Court
for the District of Columbia

FROM : Harold J. Sullivan
Chief, Major Crimes Unit

SUBJECT : Intercept of February 4, 1970

On February 4, 1970, at 8:05 p.m. a court order issued authorizing legal wire intercepts on telephone numbers 244-7027 and 244-7054, located at 5195 Linnean Terrace, Northwest, Washington, D. C. The intercepts were operational as of 9:30 p.m. on February 6, 1970. Between 9:30 a.m. February 6, and 9:40 a.m. February 11, 1970, the following developments occurred in connection with these two intercepts:

Between 9:30 p.m. on February 6, and 9:30 p.m. on February 7, nine conversations were intercepted. Four of these conversations concerned narcotics or narcotic transactions. (Note: On this day technical difficulties with the intercept resulted in poor reception and inoperability of the touch-tone decoders.)

During the period between 9:40 p.m. on February 7, 1970, through 8:00 a.m. on February 8, eighteen conversations were intercepted, of these two conversations concerned narcotics or narcotic transactions.

During the period between 8:00 a.m. on February 8, and 8:00 a.m. on February 9, 1970, six conversations occurred; three of these conversations concerned narcotics or narcotic transactions.

During the period between 8:00 a.m. on February 9 and 8:00 a.m. on February 10, forty-five conversations were intercepted, of these sixteen concerned narcotics or narcotic transactions.

During the period between 8:00 a.m. on February 10, and 8:00 a.m. on February 11, nineteen conversations were intercepted, of these two conversations concerned narcotics or narcotic transactions.

On February 10, 1970, the telephone numbers of the facilities at 5195 Linnean Terrace, Northwest, were changed from 244-7054 and 244-7027 to 244-5611 and 244-5634. The Court was orally advised of these changes on February 10, 1970.

The intercept revealed that Teri A. Lee went to Philadelphia on February 7 or 8, 1970, and returned a few days later. Her calls to Alphonso Lee from Philadelphia indicated that she was picking up narcotic supplies there, and bringing back a new man to "help with the business."

DEPARTMENT OF JUSTICE

UNITED STATES GOVERNMENT

Memorandum

DATE: 2/17/70

To : Honorable John Lewis Smith, Jr.
Judge, United States District Court
for the District of Columbia

FROM : Harold J. Sullivan
Chief, Major Crimes Unit

SUBJECT : Intercept of January 24, 1970

At 10:00 a.m. on February 13, 1970, Special Agent James Marshall disconnected the intercept on telephone 483-2948. Subsequently, at 11:20 a.m. on February 13, 1970, Agent Marshall reconnected the intercept after being informed that the authorization had been renewed for eleven (11) days.

Between 8:00 a.m. on February 13 and 8:00 a.m. on February 14, 1970, there were a total of eighteen conversations intercepted of which seven were apparently drug related.

Between 8:00 a.m. on February 14 and 8:00 a.m. on February 15, 1970, there were a total of thirteen conversations intercepted of which six were apparently drug related.

Between 8:00 a.m. February 15 and 8:00 a.m. on February 16, 1970, there were a total of twenty-eight conversations intercepted of which nine were apparently drug related.

Between 8:00 a.m. on February 16 and 8:00 a.m. on February 17, 1970, a total of twenty-one conversations were intercepted, twelve of these were apparently drug related.

On February 16, 1970, Bernie called 332-8814 listed to John Edward Scott, and asked for "Reds." Bernie said he needed fifty and "Reds" answered that he did not have that much but that he could get fifteen.

The intercept also revealed a joint trip to Baltimore by Alphonso Lee and Bernis Thurmon, two key local members of the conspiracy, on February 8, 1970.

The intercept has also revealed a number of new customers arranging to purchase from Bernis Thurmon.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA 1971 HEARINGS

GLENNON L. COOPER, resumed the stand and having been previously duly sworn, was examined and testified further as follows:

Tr. 304

MR. PALMER: No, my question was did he ever read the order actually signed by the Judge, sir.

THE COURT: Well, he just said he read it before the Judge signed it.

MR. PALMER: My point is since a Judge can modify an order——

THE COURT: Are you asking if he read it before or after is was signed?

MR. PALMER: Yes, sir.

THE COURT: All right, put that question.

MR. PALMER: Yes, sir.

BY MR. PALMER:

Q. Did you read the order after it was signed by the Judge?

A. Yes, I did, yes.

Q. At the Judge's house?

A. I don't believe so.

Q. Did you read this order before or after you installed the intercept and the pen register and the touch-tone recorder?

A. I read the order before and after it was signed.

Tr. 305—06

BY MR. PALMER:

Q. Did you understand Judge Smith's order to require you to refrain from listening to conversations that were not pertaining to narcotics or narcotics conspiracy etc.

A. I understood the order to restrict us to conversation relating to narcotics.

Q. And what did you do to follow that part of the order; to limit the extent of the wiretap in this case?

A. I relayed the instructions to the agents who would be manning the intercept.

Q. And, what did the agents do, if anything, to so limit the 24 hour day listening post?

A. The agents were to be alert to——

Q. Excuse me, sir, but my question is what did they in fact do pursuant to the order, if anything, to limit the overhear and recordation on that phone?

A. As it turned out the conversations, nearly all the conversations were recorded.

Q. Yes, sir. Is it fair to say sir, that they did nothing in fact to limit their following of or to limit their overhearing of the conversations as dictated or as indicated by Judge Smith. Is that a fair statement, sir—that they really did nothing to do that?

A. No, that is not a fair statement.

Tr. 307—08

THE COURT: Then it was understood at the beginning that in order to determine whether or not narcotics were being discussed over the phone that all conversations would have to be monitored, is that not correct?

THE WITNESS: That is correct.

BY MR. PALMER:

Q. So in other words, what you are saying is that the agents were instructed to monitor all conversations, is that correct?

A. They were not specifically instructed to monitor all conversations.

Q. What were they instructed to do, what were their instructions?

A. They were instructed to monitor calls except for those calls which fell into a privileged nature, certain restricted types of calls.

Q. What would they be, sir?

A. These were calls between, calls between a client and attorney, wherein the discussion was maybe on the pending case in which the client or the defendant may have been involved——

Q. What else, sir?

A. Well there were restrictions on calls between attorney and client, doctor and patient——

THE COURT: How were they to make this determination?

THE WITNESS: The calls would have to be listened to, when either of this type of situation would arise, in order to

determine if there was any narcotics activity being discussed.

THE COURT: Yes?

THE WITNESS: Upon determination of the call Mr. Sullivan was to be notified immediately and if in fact conversations were intercepted between client and attorney in that relationship, discussing the case, it would not be listened to any further, once that determination was made.

Tr. 309—10

Q. And those guidelines were your guidelines, that you had——

A. They were guidelines by myself and Mr. Sullivan.

Q. Did you get them from reading the Court's order at all?

A. The Court's order?

Q. Yes.

A. Judge Smith's?

Q. Yes. The order under which you were intercepting—did you get the guidelines from there?

A. Well as I say, I recall specific instructions from Mr. Sullivan—we had so many discussions relevant to the proper conduct of the intercept.

Tr. 310—11-A

BY MR. PALMER:

Q. Agent Cooper, insofar as the wiretap was concerned did you and the other agents consider the order signed by Judge Smith to be your limiting authority, your guidelines as to what to do and how to tap?

A. Yes, we did.

Q. And you have the order in front of you do you not, sir?

A. Yes.

Q. Now Agent Cooper, what guidelines of the order did you use to limit or to direct you on what were your guidelines and how you should prevent overhear or how to exercise discretion in limiting overhear of non-drug related conversations?

MR. KELLOGG: Objection, Your Honor. It seems to me that what we are getting into is a question that calls for a legal interpretation on the part of the agent, of a legal document—that is, an order. There was no question, Your Honor, and it is conceded by the Government that the order

was interpreted by the supervising attorney, Mr. Sullivan, and that he gave directions regarding this to Agent Cooper. I do not think it is appropriate to go into the interpretation of a legal document with this witness.

THE COURT: But I don't think he is asking him for a legal interpretation. He asked him what the guidelines were that he used.

Now, who interpreted that is another matter but he is not asking him to give a legal interpretation. He asked him what did he use as guidelines. Now, why he used it or what the reasons are is a different proposition.

MR. PALMER: Yes, Your Honor, exactly.

Tr. 312

BY MR. PALMER:

Q. What guidelines under the order, sir, did you use to limit the discretion of the agents in overhearing information and non-drug related conversations, sir?

A. I would have to say that I as supervising agent relied on the authority and the expertise of Mr. Sullivan and he relayed to me that his authority or our authority to intercept had come from the order.

Q. So you, sir, did not specifically read or rely on any limiting language in the order itself, that is directed to you as a member of the Bureau of Narcotics and Dangerous Drugs, is that correct, sir?

A. Well, I was told I was to rely on the authority of the order.

Tr. 313—16

Q. And you mentioned all three specifically in your application so that you could be authorized for each one, one, two and three, is that correct?

A. Yes.

Q. Did you notice in the order that you read that you had not been authorized to use a pen register touch-tone decorder as requested?

MR. BUCKLIN: Your Honor, I would register on behalf of the Government the same objection.

THE COURT: The question is did he notice, not whether he did.

MR. BUCKLIN: Well it is the same objection which you sustained to the question put to him by Mr. Shorter.

THE COURT: You may answer.

THE WITNESS: Well yesterday I believe I answered that I did see it in the order but upon further perusal I notice it is not in the order specifically.

BY MR. PALMER:

Q. So having read it, if you had read that order you would not have installed these devices, is that not correct, sir—if you had read it carefully, you would not have installed those devices? Is that a correct statement?

A. If I had, if I had been made aware or if it had been made known to me—

Q. I'm asking you, if you had read the order carefully—

THE COURT: Let him finish his answer.

MR. PALMER: Very well, Your Honor.

THE WITNESS: If it had been made known to me that I didn't have authority to initiate the intercept either by the pen register or the touch-tone decoder, it wouldn't have been done.

BY MR. PALMER:

Q. Well if you had read the order carefully yourself, and the direction to you as an agent, is it fair to say, sir, that based upon your application and based upon what was authorized as a direction to you from the Court, a Judge to you, is it fair to say that you would not have installed these devices if you had read the order carefully—either the pen recorder or the touch-tone decoder?

THE COURT: I think you are asking him now for a legal opinion, Mr. Palmer.

MR. PALMER: Well I think I'm only asking, if I may, Your Honor, as to how he read the order.

THE COURT: Well as to how he would have interpreted the order is a legal conclusion.

MR. PALMER: Actually, I am trying to see if he read it carefully and —

THE COURT: I have ruled.

BY MR. PALMER:

Q. Now, sir, who, in fact, did you rely upon to install the pen recorder and the touch-tone decoder?

A. Who did I rely upon for authority?

Q. Yes, sir.

A. As I say, the order was interpreted to me by Mr. Sullivan.

Q. To include those devices, is that correct?

A. Correct.

Q. Now, sir, in executing the order to you, did you ever know whether the intercept was to terminate upon your first receipt of a narcotic related conversation?

THE COURT: What is that question again?

MR. PALMER: Whether or not the agent knew he was to terminate an intercept upon the receipt of a narcotic related conversation overhear.

THE COURT: Well how would he know what was in an agent's mind? You can ask him whether he gave him instructions and what they were. But to ask him whether he knew what the agent knew—that is a different situation.

BY MR. P[illegible]:

Q. Were you instructed to—

THE COURT: Or whether he knows whether he gave him any instructions or knows whether any instructions were ever given to the agent.

MR. PALMER: Very well, sir.

BY MR. PALMER:

Q. Were any such instructions to terminate a tap upon receipt of the first overhear of a non-drug related conversation given?

A. No.

Q. Excuse me, what does no mean?

A. There was no instruction given to terminate the intercept upon receipt of one non-narcotic related call.

Tr. 317—318

Q. Now you indicated that if a doctor or a lawyer or a priest-penitent conversation came through, the agent was to do certain things, is that correct?

A. Correct.

Q. And the agent received his instructions as to his discretion from whom, sir?

A. Those instructions, the agent received instructions from me.

Q. From you?

A. Yes, sir.

Q. Now we have had turned over to us the transcript of all the recording of the calls, is that not correct?

A. Yes.

Q. And as part of his discretion, were the agents to limit the overhear on such things as time checks, the time of day? Was their discretion, or would you tell us what their discretion was to be as to hearing a conversation, say, relating to the time of day, for instance? Did they have any discretion as to that?

A. As I said before, it was up to the agent to listen to the conversation and determine what type of conversation it was.

Q. Well what about the time of day—is there any question about that? What were they supposed to do about the time of day in a phone call—did they have discretion as to that? What were they supposed to do and what was the understanding?

A. Do you mean a telephone call to determine what time it was?

Q. Yes, when you dial TI 4-2525, you get the time of day. What was the agent supposed to do in recording or overhearing that sort of conversation?

A. I believe we told them to listen to those conversations.

Q. And record them?

A. In the event that—

Q. —it was drug related?

A. In the event that once it was terminated and another call was placed quickly thereafter, we would be that close.

Tr. 319—321

Q. In this volume that we have, they were all from day one to the end of the taps, I believe, and could you point to any discretion exercised by any agent at any time that resulted in the non-recordation, as a discretionary matter, as to what was overheard, every minute of every day?

A. I cannot, sir.

Q. And the reason you cannot, sir, is it fair to say, is because it was a wide-open listening post, is that not so?

A. That is not fair, sir.

Q. Could you tell us either from your own knowledge, hearsay, or otherwise, a single occasion when Mr. Sullivan was called because there might have been something that shouldn't have been overheard?

A. Yes.

Q. When were they, sir?

A. Well, Mr. Sullivan was called several times during the course of the intercept.

Q. Relating to what particular, relating to what particular conversation?

A. To a particular conversation.

Q. To limit discretion in overhearing it—what was the nature of the conversation with Mr. Sullivan on those occasions that you speak of, sir? First of all, when was the first one—when was the first occasion, at what time, date and place?

A. I can't be specific. I know continuing from the time of the intercept and continuing thereafter, seven days a week, I was there, and I made phone calls to Mr. Sullivan relating to pertinent information which had been revealed as a result of the intercept.

Q. Well, what you are saying, is it not true, sir, is that you were relaying intelligence to him as to what you were picking up from the intercept? Isn't that what you are saying?

A. That is one of the things we were doing, yes.

Q. Well, wasn't what you were doing, calling up and saying, "Mr. Sullivan, listen to what we just overheard—this is pretty good stuff and I think you should know"? Is that what the calls were about?

A. No, that is not correct.

Q. Well give us an example of any call to Mr. Sullivan which you or any agent sought to limit your discretion in overhearing a conversation.

A. I know of no such incident. I would have to check and look in order to point out the page number and such.

MR. PALMER: With the Court's indulgence, may the witness refresh his recollection as to this point?

THE COURT: Yes.

THE WITNESS: Beginning on February 18, 1970—

MR. PALMER: Yes?

THE WITNESS: —and continuing until February 19, 1970, the intercept was cut off.

BY MR. PALMER:

Q. I asked you about calls to Mr. Sullivan in order to limit your discretion or the discretion of your officers.

A. Conversations were intercepted and as a result of this, telephone calls were placed to Mr. Sullivan which resulted in the cutting off of the intercept, the listening.

Q. And what was the reason for that, sir?

A. Because there was apparently a malfunction in the telephone lines due to the placing of the intercept on another wire inadvertently by the Telephone Company personnel.

Tr. 322

Q. All right. Now, going back to my inquiry, could you point out—to begin with, just one, if you can, any instance in which a call was placed to Mr. Sullivan to limit the discretion of any agent during the time of the tap and recording being in function, seeking to limit it—was that ever done, sir?

A. I don't believe there were any such calls made.

Tr. 323—325

Q. Turning to page No. 24 of the intercept, if you will—

MR. BUCKLIN: Counsel have the two copies, Your Honor. We gave up our copy.

BY MR. PALMER:

Q. Do you see in the middle of that page outgoing call from Geneva Jenkins to her mother—do you see that, sir?

A. Yes, I do.

Q. Was Geneva Jenkins' mother at all the object of your inquiry? Was she in any way, shape or form thought to be involved in a narcotics conspiracy?

A. We didn't have any knowledge one way or the other.

Q. And the conversation between Geneva Jenkins and her mother goes on for how many pages in that transcript, sir?

MR. KELLOGG: What is the number of the cite, please?

MR. BUCKLIN: Page 24.

MR. KELLOGG: I have the cite, thank you.

THE WITNESS: Three pages.

MR. PALMER: Excuse me?

THE WITNESS: Three pages.

BY MR. PALMER:

Q. It extends over page 24, 25 and 26, is that correct?

A. That is correct.

Q. Did it relate to, for example, sir, clothing—this conversation?

A. Yes, I believe it did.

Q. Did it relate to her furniture in storage?

A. Yes.

Q. Did not the whole conversation basically concern Geneva Jenkins seeking to move to another location and her mother helping her move and get a truck for her and things of that nature?

A. As I recall it without reading through it again, that was the gist of the conversation.

Q. Now, there was no attempt made to seek to limit any such conversation at all, was there, Officer, to limit the intercept any more or anything like that in that particular case, or the recording?

A. Well, the record was recorded—the call was recorded.

Q. Now is it fair to say, sir, as far as this call was occurring between Miss Jenkins and her mother, that the agent had on earphones and they were listening to the conversation as it occurred?

A. Correct.

Q. And at no time—Well, strike that.

He could have refrained from listening at any time, could he not, or he could have cut off the recording when he determined the conversation was innocuous, is that not correct, sir? He could have turned it off?

A. He could have turned it off, yes.

Q. So on this one conversation with the mother, there was nothing that you knew, nothing to indicate the mother's involvement with narcotic drugs, was there?

A. There was no discussion of narcotics, that is correct.

Q. And you never had any single piece of information, did you, that the mother was involved in any way with this illicit dealing in narcotic drugs, did you?

A. No, we did not.

Q. Is what you are saying, then, that when you get right down to it, Agent Cooper, regardless of who is called, or who is the caller, it may conceivably involve drugs at some point, somewhere and at some time and, therefore, the listening post is always maintained. Is that what you are saying?

A. I am saying that all calls would have to be listened to in order to have a determination made as to what the type of conversation was.

Tr. 348—359

Now, we indicated and you looked with me before at page number 24 of the three-page-or-so conversation between Geneva Jenkins and her mother. Is that correct?

A. That is correct.

Q. Right.

Now, was there anything in that conversation which led any agent, in any shape, form, or manner, to conclude that

her mother was in any part or related to the object of your intercept?

THE COURT: This is repetitious, Mr. Palmer. You have asked him that question.

BY MR. PALMER:

Q. Now, at page 41, sir, the next day, January 27th of 1970. . .

A. Yes.

Q. . . .there is a page in some conversation between Miss Jenkins and whom?

A. Transcript indicates the mother.

Q. Is that an entirely innocent conversation?

A. I see on the call "Geneva" indicates the first name of one of the persons. . .

THE COURT: It said what?

THE WITNESS: It indicates the name "Al," who was one of the defendants in this conversation.

BY MR. PALMER:

Q. What was the conversation about?

A. I would have to go through and refresh my recollection.

Q. Okay.

[The witness looks through the transcript in question.]

THE WITNESS: Well, the conversation, basically, is about Geneva going to her mother's; but the name of another co-defendant is mentioned also.

BY MR. PALMER:

Q. The name "Al"? Where is the name "Al" mentioned?

A. Page 41.

Q. You are referring. . .

A. The name Vernie also.

Q. Well, Vernie is her boyfriend that she's living with, right?

A. Correct.

Q. You knew that.

Is there anything in the second conversation just point out to indicate any incrimination or any wrongdoing on the part of Geneva's mother?

A. Well, after listening to the conversation, one can determine that apparently there is none.

Q. All right.

That was the second conversation.

Now, was any attempt made to not monitor the second conversation with her mother?

A. No, there wasn't.

Q. Now, at this point it's a pretty fair indication that her mother is just her mother and not involved in any wrong doing. Is that correct?

A. Well, we have no way of knowing at this point.

You couldn't be certain.

Q. You couldn't be certain. I see.

How about on page 55, now January 28th of 1970. Is there a conversation there?

A. Yes, there is.

Q. How many page conversation?

A. Little better than three pages.

Q. Between whom, sir?

A. Transcript indicates Geneva and her mother.

Q. Was there any attempt made to shut off or not to monitor that conversation as soon as it was determined whom it was between?

A. No.

Q. The conversation revolved around, for example, vitamin pills and medicine for Geneva.

A. There is some terminology on the street used to indicate quantities of narcotics.

Q. So that's what you thought that this was. Is that right?

A. Which is identical to such items as medicine and pills and things of this nature.

Q. Are you telling the Court that you thought that this conversation between her mother and Geneva Jenkins involved around narcotic drugs? Is that what you are telling the Court?

A. I'm not saying that. I am. . .

Q. But I'm asking that question.

A. The only thing I am talking about is on the transcript as soon as the call came in; I am saying that an agent listening to the call is supposed to be alert to certain language in it.

Q. I see.

A. And this type of terminology is used to identify various items of narcotics.

Q. They talk about work, moving, and a job, do they not?

A. Yes.

Q. Any indication from this third conversation that the mother is involved in what you are seeking to find out—if she is involved in the narcotic conspiracy—from the third three-page conversation?

A. As I recall from reviewing these conversations, it was determined that the conversations apparently did not involve her.

Q. Turning now to page 132, the date February 4, 1970, sir, there was reported how extensive a conversation? How many pages of transcript?

MR. KELLOGG: What was that page number?

MR. PALMER: Starting at page 132.

THE WITNESS: About four pages.

BY MR. PALMER:

Q. And how long did that conversation transpire? How long did that take, a conversation of that nature?

A. [No response]

Q. Based on your experience as to listening to these things?

A. [No response]

Q. The footage is 99 to 166. You will see at page 132 that that's the footage indicated.

A. Yes.

Q. How long would a conversation like that take?

A. I would have to guess and say a half an hour, twenty minutes or a half an hour.

Q. Here, again, nothing to indicate the mother was involved in the narcotics conspiracy, was there?

A. As I said before, on reviewing the conversations, there was no apparent involvement on the mother's part.

Q. And was there any attempt made not to listen to this conversation, up to twenty minutes or a half hour between Miss Jenkins and her mother?

A. No.

Q. Turning now to transcript 197 of February 8th of 1970, the footage is 037 to 9. That is a conversation between whom, sir?

A. The transcript indicates Geneva and Gloria's mother.

Q. Excuse me. Geneva's mother, isn't it?

A. Gloria's mother. Page 197?

Q. All right.

Who is—do you know who Gloria is?

A. Yes, I do.

Q. Had there been any other calls between Geneva and Gloria's mother?

A. Not to this point, as I recall.

Q. This was an innocent conversation, wasn't it?

A. As I recall, it turned out to be.

Q. And how long did that conversation take?

A. [No response]

THE COURT: Mr. Palmer?

MR. PALMER: Yes, sir.

THE COURT: Do you plan to go through every one of them? I believe that the record indicates that 60 percent of the calls were non-narcotics related.

MR. PALMER: Yes, sir.

THE COURT: Doesn't that establish the point that you have in mind?

MR. PALMER: Yes, sir, it does.

[Mr. Shorter and Mr. Palmer confer.]

BY MR. PALMER:

Q. At transcript 64, at the bottom, who was called on that occasion?

A. It was a telephone call to an office of an establishment.

Q. A birth control clinic?

A. Yes, sir.

Q. And was that conversation recorded also?

A. Yes, it was.

Q. Now, aside from that one time that you indicated that it was a legal tap for a one-day period because a wrong connection had been made, is there anything to indicate, anything you can point to, any log or any record, that the taps and surveillance conducted in this case was anything other than a 24-hour-a-day open wire tap? (Word 'legal' phonetically)

A. What do you mean by "open wire tap"?

Q. That everything was listened to, recorded, transcribed, all ingoing and outgoing calls, except for the one malfunction that you've indicated.

A. Well, there were other calls that were not recorded due to human error.

Q. Aside from human error—you mean by "malfunction," someone forgot to turn the switch?

A. [No response]

Q. Is that what you mean by "human error"?

A. Correct.

Q. All right.

Aside from that—talking about discretion of the agent—at any time did any agent exercise his discretion voluntarily, not recording or overhearing the conversation?

A. Virtually all of the calls were recorded.

Q. All right.

And I think you indicated, did you not, Agent Cooper, that you really couldn't tell unless you heard it and recorded it and reviewed it. Isn't that right?

A. [No response]

Q. That was one of the reasons that you gave. Isn't that correct?

A. I don't think I said that.

Q. What did you say, sir?

A. You cannot tell specifically what a telephone call is about until you begin listening to it. Once you begin listening to it, it is possible to determine what type of call it is.

Q. Right.

Now, for example, . . .

A. It is possible in some cases.

Q. Now, by the time Miss Jenkins and her mother were talking for the fourth or fifth time for about a half hour, the agent could determine, quite naturally, that was not related to anything you were interested in. Isn't that correct?

A. [No response]

Q. Is that fair to say?

A. It would be fair to say that most of the agents operating the intercept were aware of what the conversations were between Geneva and her mother.

Q. And that they were non-related to the conspiracy. Right?

A. Some of them appeared to be apparently non-related to narcotics.

Q. Was there ever—you had these guidelines. Why was discretion never exercised to not overhear and record those innocuous calls—based on the guidelines you were telling us about that existed?

A. Well, the guidelines that I mentioned were not frivolous conversation, but understanding confidential relationship.

Q. What about the birth control clinic? Did that apply to confidential relationship?

A. That was the first phone call she made. To us, it was a new receiver—a new correspondent. We normally would

listen to anyone that is talking to a new number, speaking to a new individual, some of them we hadn't noted yet.

Q. In other words, getting to the guidelines, a call is placed, for example, to the newspaper for information or for a job, that would be recorded. That's not privileged. Is that correct?

A. It probably would be, especially if it would be the first phone call to a particular number if a number were recorded.

Q. Well, it would continually be recorded if it didn't fall in the category you spoke of. A call to a newspaper would always be recorded, would it not, under these standards operating in this case? Is that not correct, sir?

A. Possibility that it would be.

Q. The way the tap was operated here, it would have been. Is that not correct to say, sir?

A. It possibly would have.

Q. "Possibly" or "probably" would have been.

A. Probably.

Q. All right.

And that would go for banks, schools—is that correct?

A. Insofar as I have said, the calls to new individuals, new parties, new number calls would be listened to as a matter of course.

Q. The first call to a lawyer, for example, would that not be recorded?

A. It would depend on the nature of the conversation.

Q. And that you could only tell by hearing it and recording it to determine if there was anything wrong about it. Isn't that correct?

A. Up until that point, you begin listening to the conversation up until the point where you determine it is or it is not a privileged conversation.

Q. And what would be the guidelines that you have for that?

A. [No response]

Q. How would you know. . .

A. You learn. . .

Q. Excuse me, sir.

How could you know—what guidelines would you have that would make you conclude—what discretionary function did you have to know that a conversation between a lawyer and one of these phones was privileged? What were your guidelines, sir?

A. If it were a conversation between an attorney and a

client and a discussion was had relative to a case under indictment, a pending case. . .

Q. What would happen?

A. The call would be determined. If it had not been. . .

Q. Would that determination only be made after the entire conversation had been recorded?

A. No.

Q. You are saying that it would have been shut off before then?

A. It would have been shut off at the time the agent knew in his mind what the subject of the conversation was.

Q. And that would depend upon the individual judgment of whatever agent was monitoring the tap at that time—that given time. Is that right?

A. Correct. Yes.

Q. Now, sir, the pen register and touch tone tape decoder picked up approximately how many outgoing numbers in this case?

A. Several. You want a figure?

Q. Yes.

A. I would say approximately—I would have to make a guess and say 30 to 40.

Tr. 401—02

Q. Agent Cooper, do you still have the transcript of the calls referred to by defense counsel?

A. Yes, I do.

Q. Would you turn to page No. 42 of that transcript?

A. Yes, sir.

Q. Which is a call which begins on page No. 41 which is listed as being between Geneva and her mother which was referred to by Mr. Palmer.

I would like to direct your attention to the fifth line from the bottom and that is the fifth notation of the speakers from the bottom where Geneva and her mother speak regarding whether or not Bernie could come by to pick her up. And then there is Geneva's response—Do you have that?

Miss Burt: I would object to that, Your Honor, because the question is being asked at this time that goes to events which occurred after the interception had been placed on the telephone. It goes to conversation after that.

The Court: This matter came out after it had passed that and Mr. Palmer raised the issue of going beyond that

matter and I permitted it and all or most of the counsel participated in that, so the objection is overruled.

MISS BURT: Yes, Your Honor.

BY MR. KELLOGG:

Q. Would you tell us what that response by Geneva was to the question by her mother as to whether Bernie could bring her over to the mother's—or?

A. The transcript indicates that Geneva says, "I got all, I got everything, you know, together, so he is out taking care of his business now."

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Title omitted in printing)

MOTION FOR RECONSIDERATION OF ORDER SUPPRESSING EVIDENCE

On April 29, 1971, this Court granted defense motions to suppress all evidence which flowed from wiretaps used in this case. The ground upon which the Court's ruling is based—that the executing agents failed to "minimize the interception of communications that are not otherwise subject to interception" (Memorandum on Motions at 38)—was advanced by only one defense counsel in writing and then in one sentence supported by a short paragraph of argument. (Motion to Suppress of Defendant Reginald C. Jackson at 3.) The United States did not respond to this issue directly in writing. While the point was pursued by other defense counsel, and opposed by Government counsel orally, neither defense or Government counsel presented the Court with a detailed analysis of each of the intercepted calls. Failure to do so has created a distorted picture of the calls' content and of the reasonableness of the surveilling agents' execution of the wiretap order.

The Court's ruling is premised on a finding that the order authorizing the wiretap was violated in that it was not executed in a way tending to minimize the interception of nonrelated calls. That finding is grounded in substantial part on representations made at hearings on defense motions, that approximately 40 percent of the calls intercepted involved narcotics and that the remaining 60 percent did not, the implication being that the 60 percent of the calls which were "unrelated" were in large measure intercepted beyond the scope of the authorizing order. It is the United States' contention that such an implication is wholly unfounded, for reasons set out below in the discussion of the call analysis.

In addition the Court's ruling is based in part on the testimony of Agent Cooper that he had no specific knowledge of calls which were not intercepted as a discretionary matter. We do not propose to present evidence to the contrary. We have argued fully our contention that the agents were specifically instructed to seize narcotics calls, that they

were specifically instructed not to listen to certain privileged calls and to report others to the supervisory attorney in order that special guidelines could be formulated regarding similar future calls. But it is not our position that all calls must be listened to in every situation in order to determine if they relate to narcotics. (Memorandum at 35.) Rather, we contend that the peculiar characteristics of *this* conspiracy were such that nearly all calls had to be listened to and were justifiably intercepted under the order. The agents were dealing with conversations that were both cryptic and equivocal, the speakers rarely identified themselves, varying coded language was extensively used, narcotics conversations were intermingled with personal conversations, narcotics transactions were conducted on the tapped telephone at all times of the day and night and involved males and females.

We submit that in these circumstances an analysis of the intercepted calls is essential to a determination of whether the agents' conduct in executing the order was reasonable and hence lawful. Accordingly, we present to the Court in connection with this motion to reconsider a detailed analysis of each call intercepted during execution of Judge Smith's wiretap order.[1]

In summary, it is our contention that on the basis of the limiting instructions to the agents discussed above, the unique characteristics of this conspiracy and the analysis of the calls intercepted that there was no violation of the order's minimization clause; that even assuming *arguendo* that calls were intercepted beyond the scope of the order, the appropriate remedy is to suppress those calls intercepted unlawfully; and finally, that in no event should incriminating calls be suppressed as to those defendants who were not parties to any call intercepted beyond the scope of the order.[2]

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[1] By appendix we have set out the call analysis of the N Street intercept in this motion. That intercept's conduct was the focus of hearings on defense motions and of the Court's memorandum ruling. We have available for the Court, similar analyses of the calls intercepted on the Linnean Terrace telephones.

[2] In the N Street intercept there were no calls intercepted involving defendant Scott, Jackson, George Jenkins, Spencer and Daviage which were in any way arguably beyond the scope of the order. None of the calls in which these five defendants were involved is even classified as UNRE—unrelated but intercepted with a reasonable expectation that it would involve narcotics.

I. *The Call Analysis Shows Substantial Compliance with the Court Order.*

A. *Statistical Summary*

From January 24, 1970 through February 24, 1970, there were 384 calls intercepted on the N Street telephone. For reasons articulated in detail below only 6 calls, or 1.56 percent were seized beyond the scope of the order. Only technical connections were counted as calls; thus, unanswered incoming and outgoing calls were not calculated as calls. Of the 384 calls, 126 or 32.8 percent involved in substance the narcotics enterprise. Seven calls, or 1.8 percent involved the narcotics enterprise in part. Twenty-one calls, or 5.4 percent were of evidentiary value, such as aiding in the identification of a conspirator. One hundred and forty-two calls, or 36.9 percent were permissibly intercepted, but ambiguous calls, the purpose of which could not be determined. The great majority of these calls consisted of the caller reaching a party other than the person to whom he desired to speak, and upon being informed that his party was not there, leaving a message that he had called. *E.g.*, A: "Is C there?" B: "No, he's gone." A: "Well tell him A called." Where no subsequent call revealed the purpose of such a call, it was classified as ambiguous. Twenty-seven calls, or 7.04 percent were calls to a number where only a recording was played at the called number. Fifty-five calls, or 14.3 percent involved conversations unrelated to the narcotics enterprise, but which were intercepted, for reasons set out below, with a reasonable expectation that narcotics would be involved. Six calls, or 1.5625 percent involved conversations unrelated to the narcotics enterprise which could not reasonably have been expected to involve narcotics or material of evidentiary value.

Narcotic in Substance—NS. This category is self-explanatory and involves conversations relating to the narcotics enterprise in substance. Examples of these are as follows: 1) Al Lee calls Bernie and asks him to bring his "thing" to the hospital, and they discuss the manner in which it will be paid for. I.Tr. 1. 2) Mickey calls Geneva and asks her to tell Bernie that she is at the Zanzibar and orders "1 and 1." I.Tr. 82. 3) George calls Bernie and tells him to "bring me a trey." I.Tr. 83. 4) Al Spencer calls Bernie and tells him to come over, to "bring my son" and that he (Spencer) has money, "a trey" for him. I.Tr. 114. 5) Bernie calls Red

and tells him Al Lee just called and said that "he couldn't make no more" until he picked up the scratch, probably tomorrow. Red said it would not be tomorrow, that Bernie would have his thing this evening. Bernie said that he was maked and to order that "other thing" for him. I.Tr. 172.

Narcotic in Part—NP. This category involves conversations the bulk of which are unrelated to narcotics, but a part of which do relate to narcotics. For example, Bernard Smith calls Bernie and they have a conversation concerning various matters, including professional basketball. At the end, Bernie says he is coming over that way and Bernard says that Bernie should bring him "a dime" and a little "other stuff." I.Tr. 98.

Mere Evidence—ME. Calls in this category do not involve ordinary purchases and sales of narcotics by the speakers. They do, however, provide information of evidentiary value within the scope of the authorizing order's objective. See *Warden v. Hayden,* 387 U.S. 294 (1967). Following are examples: 1) Al Spencer calls Bernie and tells him he has just been to see Al and Al told him Bernie owed him $150, and that Bernie had said he would send it to him by Al Spencer. I.Tr. 5. Less than an hour before Bernie had had a conversation with Al Lee in which Lee asked Bernie to send his "thing" to the hospital and they discussed the $150 Bernie owed Lee. Bernie said he'd send it by "Al, that nigger with the Mark III." I.Tr. 2. The Spencer-Thurmon conversation shortly thereafter is of evidentiary value because it corroborates the first mention of the prospective delivery by the third person, and second it serves to assist in the identification of the delivery man, Al Spencer. 2) After a call from Al Lee to Bernie in which Lee says that Red wants him to pick up the scratch and they agree to meet, Lee calls Bernie back and asks him to "bring that title" with him. I.Tr. 172. This call, though not narcotic in its content is of evidentiary value because Lee was observed during one of the informant purchases recited in the wiretap application, riding a motorcycle, the tags to which were registered to Benjamin Thornton, a Thurmon alias, at 1425 N Street, NW., Apartment 603. The "title" referred to was suspected to be the title to the motorcycle which would have been mailed to the registered owner, Thornton, rather than the true owner, Lee. When a search warrant was executed at the Lee premises at the conclusion of the intercept, a title in Thornton's name and address for the motorcycle might well have been discovered. 3) Grace calls

Bernie from New York and tells him that a fellow up there had a "thing that will take ten for $1,000.00." She said she had started to call Bernie to come get it, but she "didn't think [he] wanted to be on [his] own." When Bernie said he was on his own, she said "you know what I mean, away from other people. Is Al still in the hospital!" I.Tr. 125. This statement is of obvious evidentiary value, linking Bernie to Al as a buyer from Al.

Ambiguous. Calls classified in this category are generally so brief that the purpose of the call could not be determined, nor had any opportunity or reason arisen to disconnect the intercept. For example, there are many calls in which the caller asks for a party who is not present, and upon being informed of that, says he will call back. In any of the variations of this, if no subsequent call explains the purpose, it is classified as ambiguous. *E.g.,* I.Tr. 58, 65, 68, 272. If a subsequent call does explain the purpose of the first call it was classified in the same category as the subsequent call.

The United States contends that all calls in this category were lawfully intercepted under Judge Smith's order. We submit that the agents must be permitted to listen to enough of any igven call to determine its basic purpose. And if a call simply does not progress to the point that a purpose can be determined, there could have been no violation of the intercept order. For even if the agents are to intercept communications in a manner so as to minimize the interception of unrelated calls, they cannot reasonably be required to shut off the interception of any call until its basic purpose is known. We emphasize here that this is not to say all calls must be listened to in their entirety to know what they are about. Rather, this category was used only for calls which terminated before a purpose could be determined.

Recordings—R. These calls consist of calls to numbers at which the caller hears only a recorded message: time, weather, and the like. The Court in its memorandum filed herein, cited the interception of these calls as examples of interceptions beyond the scope of the authorizing order. (Memorandum on Motions at 35.) It is the Government's position that the interception of these calls was clearly permissible and not in violation of the order because they intercept nothing intended to be private. The recordings are intended for use by the general public and carry a telephone number listed in the District of Columbia telephone directory. Since nothing is obtained that is not openly avail-

able to the general public, there is a minimal, if any, invasion of the caller's privacy. The only information gained is the fact and time of such a call. This information could have been obtained through use of a pen register device alone, a use which the wiretap statute's legislative history explicitly indicates is *not* an "interception" as that term is used in the statute. S. Rep. 1097, April 29, 1968 at 90.

Unrelated but Intercepted with a Reasonable Expectation of Related Conversation—UNRE. There were 55 such calls intercepted throughout the N Street wiretap. They include the interception of both incoming and outgoing wrong number calls where no subsequent call makes clear the purpose of the call. The wrong number calls were not characterized as "ambiguous" because, particularly with incoming calls, the purpose was presumably not narcotic—and that is not true of the calls classified as ambiguous. In addition, various calls were intercepted which were unrelated to the narcotics enterprise, but which for differing reasons based on the totality of information about the Scott-Lee-Thurmon conspiracy available to the agents *at the time* were intercepted with a reasonable expectation of related material. Certain basic facts about the conspiracy as it was known then are essential to this concept. First, the number of conspirators, the age, sex, race, economic position of many potential conspirators and whether employed or unemployed, were all unknown to the agents. Second, as the affidavit in support of the wiretap application indicates, the focus of the wiretap investigation was the out of state and international narcotics connections which appeared from the evidence gathered at that time. These locations included among others, Atlantic City, New Jersey, Philadelphia, Pennsylvania, New York City and Ecuador. Third, virtually all conversations material to the conspiracy could reasonably be expected to be conducted in coded or cloaked language. As this wiretap developed, in fact, narcotics transactions were conducted in terms which varied as to each conspirator, *i.e.*, each conspirator who dealt with Bernis Thurmon, whose phone was tapped, used a different set of terminology to communicate with Thurmon. For example, Al Spencer used the conventional boy-girl, heroin-cocaine language. I.Tr. 90,113. Red Scott, in dealing with Thurmon, however, used the terms "thing," "equipment" and others to refer to narcotics. I.Tr. 48,213. Duke Williams, in still another variation used the term "street" preceded by the number of narcotic units he was ordering, thus "put

me on Fifth Street" or "meet me on Fourth Street" indicated an order for 5 and 4 units of narcotics respectively. I.Tr. 192. Also, many calls involved innocuous conversation until the end, and concluded with an order being placed, or narcotics being discussed. E.g., I.Tr. 98,122. In sum, it is fair to say that the entire situation presented the agents with quite difficult decisions based on a substantial number of complex factors.

As an illustration of the confusion and uncertainty which the entire situation engendered, there were *two* separate arrest warrants sought and issued for the defendant Frank Scott. One was in his correct name and another in the name Alan Cole, the name in which the phone at 1230 13th Street, NW., was listed. At the conclusion of the wiretap, it was felt that these were likely two separate people.

On the basis of the factors set out above, we propose the following guidelines in determining whether individual calls were intercepted within the scope of Court authorization:

1) All calls between two known conspirators are permissibly intercepted, absent some clear showing of a withdrawal from narcotic dealings.
2) The first call between a conspirator who has dealt in narcotics over the phone and a new caller is permissible to determine whether the new caller is involved in the narcotics operation.
3) Subsequent calls between a conspirator and the "new caller" are permissibly intercepted until that person's involvement in the narcotic conspiracy may reasonably be excluded.
4) Calls to which an unidentified conspirator is a party are permissibly intercepted unless privileged to aid in the identification of the conspirator.[3]

We have applied these general principles in classifying these 55 calls as UNRE, and we submit that they were intercepted within the order's scope.

B. *The Geneva-Mother Calls*

The series of calls between Geneva and her mother were cited by the Court as "the most blatant examples" of a

[3] Section 2510(8) defines "contents" of a communication to include information concerning identity of the parties to such communication. In addition, Sections 2518(1)(b)(iv), and 2518(4)(a) require that the application and order set forth the persons whose communications are to be intercepted only if known.

failure by the agents to minimize the interception of unrelated calls. (Memorandum at 36.) We will deal with each of these calls to demonstrate how the combination of the background information known to the agents at the time, the use of cloaked language by conspirators, and various statements by the mother herself made interception of the calls reasonable under the mandate of the order.

January 26, 1970 at 1900, I.Tr. 24. The first call between Geneva and her mother was at this date and time. It was known at that time that the telephone being intercepted was listed to Geneva Thornton, Benjamin Thornton was a Thurmon alias, Thurmon had been using the phone to transact narcotic business and a female named Geneva had engaged in conversations with Thurmon on that phone, and with others from that phone. From the outset then it was reasonable to treat her as a likely conspirator. Accordingly, the first call between Geneva and any person would seem to be the permissible subject of interception, to determine whether the other person as well as Geneva, was a conspirator. In addition, Geneva speaks in the conversation about moving, and various efforts to get someone to pick up her clothing. If the assessment that it was likely Geneva was a conspirator was correct then certainly knowing when, where, and the fact that she was moving is of evidentiary value. If she was a conspirator at N Street, she could well be setting up business elsewhere if and when she moved. Also, at this time Geneva had not been identified visually. If she made arrangements to move, surveillance could be established to see whether anyone did the things which the voice of Geneva indicated she was going to do, *i.e.*, go to her mother's.

January 27, 1970 at 1604, I.Tr. 41. Here, Geneva again speaks about moving to her mother's. But early in the conversation her *mother* says that Al and two other men, Carl and Ben had called for Geneva, and that the mother had had a conversation with Al. One day earlier, Geneva had talked to a man named Ben in a call to 244-7027, a number listed to Alphonso Lee's residence on Linnean Terrace. I.Tr. 20. Thus, it was a reasonable inference when Geneva's mother indicated that Al, Ben and Carl had called, that the mother knew these people and that the Al was Alphonso Lee. In addition, on page 42, toward the bottom of the page, after the mother indicates that Bernie might be able to bring Geneva and her things over, Geneva says "he's out taking care of his business now." These facts, in

the second call between Geneva and her mother, rather than indicating that the mother was not involved in narcotics, indicated that she likely knew conspirator Al Lee, to the extent that he talked to her on the telephone, and that she knew conspirator Thurmon and might well have known about his "business." On this basis, we think that the agents were clearly justified in exploring further Geneva's calls to her mother to determine whether in fact the mother was involved as a conspirator.

January 27, 1970 at 1908, I.Tr. 44. This call followed the previous call by about three hours and consists of additional talk about Geneva's moving and whether Bernie would be able to take her. No additional information appears regarding any possible involvement of the mother, but the information is of evidentiary value in determining when, where, and whether conspirator Geneva was moving.

January 28, 1970 at 1745, I.Tr. 55. During this call Geneva and her mother discuss various matters including, but not limited to Geneva's possible move. Her mother asks her why she didn't take her medicine with her if she wasn't coming back, and Geneva says that she has "vitamin pills" where she is. This term, while in retrospect apparently innocuous here, is frequently used in narcotic circles to denote narcotics.

During the 1745 call to her mother, Geneva says that the reason Bernie didn't bring her to her mother's last night was that "he was out taking care of his business." I.Tr. 55. The last call intercepted on January 27, the day before, at 1911 was an order from Leroy Houston for "11." Bernie said, I'll "see you in 15 minutes." I.Tr. 45. Because this is of evidentiary value not only against Bernie, but because it tends to show the likelihood when coupled with Geneva's other reference to Bernie's "business" of knowledge on Geneva's part of Bernie's "business" this call is classified as mere evidence, and not as UNRE.

February 4, 1970 at 1716, I.Tr. 132. In the next call between Geneva and her mother, they talk principally about why Geneva has not been to see her mother. But the mother indicates repeatedly a secretiveness about what it is she has to discuss with Geneva and wants to talk to her in person. "I ain't gonna tell ya on the phone," her mother says. I.Tr. 133. Again she repeats "I got somethin to tell you I ain't gonna tell on no phone because *you ain't suppose talk business on the phone.*" I.Tr. 134. (Emphasis added.)

On the basis of the prior calls showing the mother's ac-

quaintance with conspirator Lee, Geneva's references in conversations with her mother to Bernie's being out taking care of "business" the agents had a basis to suspect a possibility of complicity by the mother. This call simply reinforces the suspicion, even though it appears in retrospect that the mother was not involved. Her secretiveness in talking about her "business" over the telephone was repeatedly and emphatically expressed. It is a secretiveness commonly displayed by the conspirators in this case, and indeed most people in the narcotics business. We do not contend that narcotics dealers are the only persons who display a disinclination to discuss personal business on the telephone. But the agents in executing the Court's wiretap order here, the object of which was to obtain "the participants and the nature of the conspiracy. . . ." were, we assert, authorized to intercept conversations of persons until it was reasonably clear they were *not* conspirators. Order at 2. This is especially true here, where at the time all Geneva's calls to her mother were intercepted the wiretap had shown that there was in fact a narcotics conspiracy and that Bernis Thurmon and others were using the tapped N Street telephone to conduct it.

Geneva's complicity in the conspiracy while unsettled initially became increasingly clear during the first few days of the intercept's operation until she was firmly identified as a conspirator. This occurred in the two calls intercepted immediately prior to the call between Geneva and her mother discussed here. Bernard Smith called and told Geneva that if Bernie came back before he got over there, to tell him to leave a 20 and a 40 where he could get it. In the next call Bernie called Geneva and she relayed the message. I.Tr. 131-32. Accordingly, the establishment of Geneva's participation in the conspiracy gave added weight to the interception of this call with her mother. It created the possibility that she would say something, though innocent in appearance even to her mother, that would be of evidentiary value both against herself and against other conspirators. For example she might have said to her mother that Bernie was gone over to northeast after he had received an order to deliver narcotics in northeast, or that he had gone over to K Street after he had received an order from Duke Williams who lived on K Street, SE.

February 4, 1970 at 1829. I.Tr. 136. In this call the mother tells Geneva not to come over that night because it's too cold. Mother talks about having been to the doctor about

her blood and heart, then repeats that Geneva should come to see her so they could talk; that she would not "be up there long" if she stayed with Bernie; and she again says: "I ain't going to tell you why, cause I ain't talking in no phone." I.Tr. 138.

While this call does not implicate the mother in any way it certainly does not reasonably eliminate the possibility. The continuing secretiveness leaves the situation approximately as it was at the conclusion of the prior call some hour and fifteen minutes earlier. We contend that it was clearly reasonable for the agents to intercept this call.

February 12, 1970 at 2041. I.Tr. 247. In this call Geneva and her mother talk for a considerable period of time (the transcript covers about 13 pages) about various personal matters. In the beginning her mother says that "Reds called, asked for Mama's number." I.Tr. 247. This is the nickname used by Frank Scott, the lead defendant in this case. In addition, on February 9, 1970 at 1357, Al Lee had talked to Reds, and Reds said that his mother had said Lee was supposed to bring something past there and that he should go do it. I.Tr. 441. At 1405 the same date Lee called a woman at a number listed to 163 13th Street, NW., and called her "Mom." Mom told Al that his "breakfast" was ready. Lee said: "Ok, I be over there to get it this evening Mom." Thus, the mention by Geneva's mother of Reds and "Mama's" number in the same breath, reasonably aroused the agents' suspicions. The balance of the call does not indicate any narcotic involvement by the mother. Nevertheless, we think the call was reasonably intercepted.

C. *The Bank Call*

The Court cites in its Memorandum the incoming call between a representative of the Riggs National Bank and Bernis Thurmon regarding verification of a check, as an example of a call intercepted beyond the scope of the authorizing order. (Memorandum at 35) I.Tr. 47. We respectfully disagree for the following reasons.

The enormous profits which can be derived from traffic in illicit narcotics, are, it is fair to say, the principal motivation for trafficking. Just as it is lawful for officers executing a narcotics search warrant to seize money which appears to be the proceeds of the enterprise, we contend that conversations indicating the existence of a bank account in the name of a conspirator are properly intercepted under

an order which directs the interception of conversations involving certain persons and others engaged in a narcotics operation. At the time this conversation was intercepted, extensive surveillance of defendant Thurmon had been conducted, both visual and electronic (over the tapped phone). It was reasonable for the agents to have concluded then from seeing Thurmon, and hearing him at varying times throughout several days, appearing not to work at any job, driving a Lincoln automobile, engaging in narcotics dealings virtually every day and often many different times a day, that any money he might have had then was the proceeds of his illicit narcotics business. It simply blinks reality, we submit, when the entire purpose of a narcotics enterprise is to make money, not to permit the interception of conversations concerning money within the scope of an order directed to a narcotics operation such as

• • •

There is still a separate ground upon which the interception of this call may be justified. The call is of substantial evidentiary value in that Bernie identifies himself by his true name, Thurmon, for the first time. This, of course, contributes substantially to the identification of defendant Thurmon as the speaker of the intercepted calls who identifies himself throughout as Bernie. The call also shows his wariness at acknowledging his name. He asks to know just who is calling before he does so. And then he pauses as if he has called a second person to the phone, although as the transcript notes, the same person speaks. We contend then, that the call was clearly the proper subject of interception completely apart from the financial argument above.

D. *The Geneva-Marilyn Job Call*

The Court cites the call from Geneva to Marilyn in which they discuss Marilyn's possible qualifications for a job, as an example of a call intercepted beyond the scope of the authorizing order. (Memorandum at 35) I.Tr. 148. We respectively disagree.

As we indicated earlier, on February 4, 1970 at 1640 it became clear to the agents that Geneva was involved as a conspirator. Shfle received an order from Bernard Smith for "a 20 and a 40," relayed the order to Bernie a few minutes later, and then when Smith later the same afternoon talked to Bernie and asked him if Geneva had told Bernie about him, Bernie said she had, "a forty and twenty?" Smith replied, "Yeah." I.Tr. 131, 132, 136. With

this background establishing Geneva's complicity together with the knowledge that frequently calls between conspirators involve innocuous conversation for virtually all the call, only to end with a narcotic order or discussion, we think that it is reasonable to intercept the initial call between a conspirator and any unknown person. This call, while apparently innocent, was the first call between Geneva and any female by the name of Marilyn.

In summary, our contention that there was substantial compliance with the order's direction that the intercept be conducted so as to minimize the interception of unrelated material has a three-pronged basis:

1. The limiting instructions given to and *followed* by the agents were clear efforts at minimization. The instructions applied largely, however, to situations which just did not occur.
2. The peculiar characteristics of this conspiracy were such that nearly all calls had to be intercepted to achieve the order's objective.
3. The call analysis shows that the agents' actions in executing the order resulted in seizure of an insubstantial number of calls beyond the scope of the order. (6 of 384.)

On the basis of the above, we request that the Court reconsider its ruling of April 29, 1971, and find that there was substantial compliance ' with the authorizing order.

APPENDIX

DATE & TIME	NS	NP	ME	A	R	UNRE	UN
01/25/70							
12:01 p.m. to 6:00 p.m.	6	0	2	3	0	2	0
6:01 p.m. to 12:00 a.m.	4	0	1	2	0	0	0
01/26/70							
12:01 a.m. to 6:00 a.m.	0	0	0	1	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	2	0	0	0
12:01 p.m. to 6:00 p.m.	2	0	0	5	0	1	0
6:01 p.m. to 12:00 a.m.	3	0	1	1	0	3	0
01/27/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	1	0	0	1	0	0	0
12:01 p.m. to 6:00 p.m.	0	0	5	2	0	0	0
6:01 p.m. to 12:00 a.m.	1	0	0	0	0	1	0
01/28/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	1	0	0	0
12:01 p.m. to 6:00 p.m.	4	0	3	2	0	0	0
6:01 p.m. to 12:00 a.m.	3	0	0	4	0	0	0
01/29/70							
12:01 a.m. to 6:00 a.m.	1	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	1	0	0	0	0

DATE & TIME	NS	NP	ME	A	R	UNRE	UN
12:01 p.m. to 6:00 p.m.	1	0	0	7	0	0	0
6:01 p.m. to 12:00 a.m.	2	1	0	3	0	0	0
01/30/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	0	0	0	0
12:01 p.m. to 6:00 p.m.	0	1	0	2	0	0	0
6:01 p.m. to 12:00 a.m.	5	0	0	3	0	0	0
01/31/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	2	0
6:01 a.m. to 12:00 p.m.	0	0	0	1	0	0	0
12:01 p.m. to 6:00 p.m.	1	0	0	1	0	2	0
6:01 p.m. to 12:00 a.m.	2	0	0	2	1	0	0
02/01/70							
12:01 a.m. to 6:00 a.m.	1	0	0	1	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	0	0	0	0
12:01 p.m. to 6:00 p.m.	0	1	0	2	0	0	0
6:01 p.m. to 12:00 a.m.	1	0	0	0	0	0	0
02/02/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	1	0	0
6:01 a.m. to 12:00 p.m.	2	0	0	1	0	0	0
12:01 p.m. to 6:00 p.m.	0	0	0	6	0	2	0
6:01 p.m. to 12:00 a.m.	1	0	0	0	0	2	0

DATE & TIME	NS	NP	ME	A	B	UNRE	UN
02/03/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	1	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	2	0	0	0
12:01 p.m. to 6:00 p.m.	1	0	0	1	0	2	0
6:01 p.m. to 12:00 a.m.	1	0	1	4	0	2	0
02/04/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	0	1	0	1
12:01 p.m. to 6:00 p.m.	5	0	0	3	0	1	0
6:01 p.m. to 12:00 a.m.	2	0	0	1	0	2	0
02/05/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	0	0	0	0
12:01 p.m. to 6:00 p.m.	1	0	0	2	2	3	1
6:01 p.m. to 12:00 a.m.	1	0	0	1	0	0	0
02/06/70							
12:01 a.m. to 6:00 a.m.	0	1	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	1	0	0	0	0	0	0
12:01 p.m. to 6:00 p.m.	3	0	1	5	0	0	0
6:01 p.m. to 12:00 a.m.	5	0	1	1	0	2	0
02/07/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	0	0	0	0

DATE & TIME	NS	NP	ME	A	B	UNRE	UN
12:01 p.m. to 6:00 p.m.	4	0	1	2	0	3	0
6:01 p.m. to 12:00 a.m.	2	0	0	5	0	0	0
02/08/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	0	2	0	0
12:01 p.m. to 6:00 p.m.	0	0	0	3	0	2	0
6:01 p.m. to 12:00 a.m.	0	0	0	0	0	0	0
02/09/70							
12:01 a.m. to 6:00 a.m.	0	0	0	1	1	0	0
6:01 a.m. to 12:00 p.m.	1	0	0	2	0	0	0
12:01 p.m. to 6:00 p.m.	1	0	0	1	0	0	1
6:01 p.m. to 12:00 a.m.	2	0	1	2	0	0	0
02/10/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	0	0	0	0
12:01 p.m. to 6:00 p.m.	2	0	0	2	0	2	0
6:01 p.m. to 12:00 a.m.	1	0	0	0	0	0	1
02/11/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	0	0	0	0
12:01 p.m. to 6:00 p.m.	0	0	0	0	0	0	0
6:01 p.m. to 12:00 a.m.	3	0	0	2	0	1	0

DATE & TIME	NS	NP	ME	A	R	UNRE	UN
02/12/70							
12:01 a.m. to 6:00 a.m.	0	0	0	1	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	0	0	0	0
12:01 p.m. to 6:00 p.m.	1	0	0	4	2	0	0
6:01 p.m. to 12:00 a.m.	9	0	0	4	0	1	0
02/13/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	1	0	0	1	0	1	0
12:01 p.m. to 6:00 p.m.	5	0	0	3	0	1	0
6:01 p.m. to 12:00 a.m.	1	0	0	5	0	1	0
02/14/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	1	0	0	0	0	0	0
12:01 p.m. to 6:00 p.m.	1	0	0	2	1	0	1
6:01 p.m. to 12:00 a.m.	0	0	0	6	0	3	0
02/15/70	NO CALLS INTERCEPTED ON 02/15/70						
02/16/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	0	0	0	0
12:01 p.m. to 6:00 p.m.	3	0	0	1	0	2	0
6:01 p.m. to 12:00 a.m.	6	1	0	6	0	0	0
02/17/70							
12:01 a.m. to 6:00 a.m.	1	0	0	0	0	2	0

DATE & TIME	NS	NP	ME	A	R	UNRE	UN
6:01 a.m. to 12:00 p.m.	0	0	0	0	0	0	0
12:01 p.m. to 6:00 p.m.	0	0	0	0	0	0	0
6:01 p.m. to 12:00 a.m.	0	0	0	0	0	0	0
02/18/70	NO CALLS INTERCEPTED 02/18/70						
02/19/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	0	0	0	0
12:01 p.m. to 6:00 p.m.	1	0	0	0	0	0	0
6:01 p.m. to 12:00 a.m.	4	0	0	0	0	0	0
02/20/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	0	2	1	0
12:01 p.m. to 6:00 p.m.	0	0	0	0	0	0	0
6:01 p.m. to 12:00 a.m.	0	1	1	1	0	0	0
02/21/70							
12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	0	0	0	0
12:01 p.m. to 6:00 p.m.	2	0	2	0	2	0	0
6:01 p.m. to 12:00 a.m.	4	0	0	2	1	3	0
02/22/70							
12:01 a.m. to 6:00 a.m.	0	0	0	2	2	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	0	1	1	0
12:01 p.m. to 6:00 p.m.	0	0	0	0	1	1	1

DATE & TIME	NS	NP	ME	A	B	UNRE	UN
6:01 p.m. to 12:00 a.m.	2	0	0	0	1	0	0
02/23/70 12:01 a.m. to 6:00 a.m.	0	0	0	0	0	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	1	0	0	0
12:01 p.m. to 6:00 p.m.	3	1	0	1	3	3	0
6:01 p.m. to 12:00 a.m.	2	0	0	3	0	0	0
02/24/70 12:01 a.m. to 6:00 a.m.	1	0	0	0	1	0	0
6:01 a.m. to 12:00 p.m.	0	0	0	0	0	0	0
12:01 p.m. to 4:00 p.m.	1	0	0	1	1	0	0

PHONES DISCONNECTED AT APPROXIMATELY 4:00 p.m.
DURING EXECUTION OF SEARCH WARRANTS 02/24/70.

TOTALS

Calls: 384	126	7	21	142	27	55	6
Percentage	32.8	1.8	5.4	36.9	7.0	14.3	1.56

ABBREVIATIONS

NS—Communications which in substance relate to the narcotics enterprise.
NP—Communications which relate to the narcotics enterprise in part.
ME—Communications not concerned with the narcotics enterprise but nonetheless of important evidentiary value.
A—Communications so ambiguous that their purpose cannot be determined.
B—Communications consisting totally of a recorded message.
UNRE—Communications which are unrelated to the narcotics enterprise but which were intercepted with a reasonable expectation of related material.
UN—Communications which are unrelated to the narcotics enterprise and which were intercepted with no reasonable expectation of related material.

1974 HEARINGS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA
vs.
FRANK R. SCOTT, et al.
} Criminal No. 1088-70

—and—

UNITED STATES OF AMERICA
vs.
BERNIS L. THURMON, et al.
} Criminal No. 1089-70

Transcript of Hearing

TUESDAY, OCTOBER 15, 1974
WASHINGTON, D. C.

Hearing on remand on the issue of minimization and other motions was commenced before THE HONORABLE JOSEPH C .WADDY, United States District Judge, at 9:41 a.m.

[72] Q. Now sir, as of the time of the requested intercept, what was your understanding of the nature of the conspiracy, that is to say, the scope of the conspiracy you were inquiring into?

A. We had some indication that the individuals involved were running a major interstate narcotics operation, both importing narcotics from overseas and diluting them for local distribution in the Washington, D. C., area.

Q. What type of narcotics?

A. Heroin.

Q. Any other type of narcotic, or dangerous drug?

A. And cocaine, also.

Q. Now at the time . . .

THE COURT: Was this your understanding at the time of the application for the wiretap?

WITNESS: That's correct.

THE COURT: Or did that information come to you subsequent to the time, or during the wiretap?

WITNESS: We suspected that the operation involved such a scope; in other words, interstate traffickers, importation of heroin and local distribution in the Washington, D. C., area.

BY MR. ADELMAN:

Q. Agent Cooper, again referring you to the time of the initial application, do you recall the identity of any of [73] the persons whom you at that time knew were involved in this conspiracy?

A. At the time of the original affidavit?

Q. Yes.

A. Well, it was Alphonso Lee. The individual I identified at that time was Alphonso Lee, Bernis Thurmon, Frank Scott, and there were other individuals who were not subsequently indicted.

Q. Now sir, did you in the course of the intercept have occasion to, yourself, listen-in to certain conversations intercepted?

A. Yes, sir, I did.

Q. And what—did anyone else do that, sir?

A. Yes, they did.

Q. Who did that?

A. Agents of the Drug—of the-then Bureau of Narcotics and Dangerous Drugs.

Q. Were you there supervising, sir?

A. Yes, I was.

Q. Now during the time the intercept was in effect, that is, the intercept both for the Thornton telephone, or the Jenkins telephone, and the Lee telephone, did it come to your attention that any other additional persons, or new persons, unknown to you originally who were member of the conspiracy?

[74] A. We were able to identify numerous other inidividuals who were subsequently indicted.

Q. Do you recall any of their names, sir?

A. Yes, sir, it would be Chloe Daviage, George Jenkins, Reginald Jackson, Evelyn Abston, Alfred Spencer.

Q. Now precisely how was it that these people were brought to your attention?

A. They are identified through the operation of the intercept.

Q. Now during the pendency of the intercept, did you have any change in judgment as to the scope of the conspiracy?

A. Well, we realized that the—we were concerned with many customers, with the local purchases located within the Washington, D. C., area, many more than we had assumed.

Q. Did you notice any other differences in the conspiracy that you discovered on the wiretap than from what it was originally conceived to be?

A. Would you repeat that?

Q. Yes. Did you notice any other differences in the conspiracy as it evolved over the wiretap than it was originally conceived to be before you got the wiretap?

A. Well, we were able to—as I said, we were able to identify individuals that we did not know about originally and we were able to identify someone whom we assumed to be [75] the principal figure in the conspiracy. But this—in effect, this did not come about until substantially the period for which we had been authorized had been completed.

Q. During the period of the intercept?

A. That's correct.

Q. Now sir, during the period of the intercept, were any surveillance efforts undertaken?

A. Yes, they were.

Q. Would you describe those, please?

A. On many occasions, the telephone would—a telephone call would be placed to a location and if we had the listing for that telephone number, we were able to supply police officers in order to surveil the possible meeting, or whatever was being arranged; or when the telephone call was made and there was some indication that the caller was going to meet someone at a certain location, we would, also, attempt to surveil the meeting in order to see if any narcotics was transferred, or to identify the individuals involved.

Q. Now sir, during the course of the intercept, did you notice the use of any code words, or disguises by the callers?

A. Yes, we did.

Q. Would you describe those to His Honor, please?

A. Well, there was numerous code terms used. It appears that certain individuals who became identified as [76] callers, or customers, or suppliers, or whatever, would use their own terminology; not everyone used the same type

of terminology. Once this terminology had been learned by us, that is, by agents of the Bureau during the operation of the wire intercept that had been completed not too long before this one, so we were alert for this type of language.

Q. What was the name of that wire intercept case?

A. That was the Jackson-Tantillo wire intercept.

Q. Did you participate in that, sir?

A. Yes, I did.

Q. About what period of time did that wiretap cover?

A. It was begun in August of 1969. . .

MR. DREOS: If Your Honor please, I would question the relevancy of the testimony relating to some other case in connection with this case.

THE COURT: The objection is overruled.

BY MR. ADELMAN:

Q. Thank you. Would you continue your answer?

A. That intercept began in August of 1969 and continued for about 30 days.

Q. Could you give us some examples of the code words, the code languages that were used by the participants in this conspiracy?

A. Well, probably the most common terminology used was the male-female gender type adjectives, any type of [77] adjective denoting the male gender would be used for heroin, such as "boy", "man", "son", "nephew", things of this nature. Any type of female gender name would be used to describe cocaine, such as, "girl", "neice", "broad", things of this nature.

Q. Now have you concluded?

A. Well, there were others, as many as other terminology as . . .

Q. Would you briefly describe those for this Court?

A. All right, when ordering a quantity of narcotics, certain callers would say, "one thing", or "one and one" and to the listening agents this meant that "one thing" would mean one quantity of whatever that particular customer normally purchases; "one and one" would mean one of each type. In other words, there would be no need to identify the type of drug, specifically because the caller would know what the terminology is and the person on the other end of the line would also know what the terminology is.

Q. Agent, did the term, or phrases, "Fifth Street" and "Fourth Street" come to your attention during this intercept?

A. That's correct, it did.

Q. What significance . . .

MR. DREOS: I object to the leading question.

MR. ADELMAN: It's not a leading question.

[78] THE COURT: The objection is overruled.

WITNESS: We came to determine that this was an indication for a quantity that the caller or the customer wanted. If you said, "Put me on Fifth Street", that meant he wanted five quantities of that particular narcotic drug that was ordered.

BY MR. ADELMAN:

Q. Now sir, you indicated that you participated in the "Slippery Jackson" intercept, is that correct?

A. That's correct.

Q. And did you apply any of your experience, or knowledge of that intercept to your operation on this one?

A. Yes, we did.

[87] Q. Finally, sir, let me direct your attention in the transcript, the collection of calls of the telephone conversations between Geneva Jenkins and her mother. Have you had occasion to examine those?

A. Yes, I have.

Q. When was the last time you did that?

A. Last evening.

Q. Now do you have an opinion as to the value or the use of those calls in the investigation of the conspiracy that you have described?

A. Yes. I feel that most of those calls between the [88] conspirator, Geneva Jenkins, and her mother contained language and terminology that have been used—some of the language and terminology, we know, has been used in the past to denote narcotics, narcotic paraphernalia, and things of this nature. Not only that, there were indications where the mother, apparently, was aware of the operation of one of the conspirators, namely, Mr. Thurmon. She was familiar with Mr. Lee and another individual that was mentioned in a conversation who, apparently, had been at Mr. Lee's residence some time before. I feel that we had reason to believe that she had knowledge of—at least had reason to suspect that she had knowledge of the conspiracy.

MR. ADELMAN: That's all I have. Thank you.

MR. PALMER: May I inquire, first, Your Honor?

THE COURT: You may.

CROSS EXAMINATION

BY MR. PALMER:

Q. Now you just indicated—just taking the last part, you indicated that from your reading last night, or thereabouts of conversations between Geneva Jenkins and her mother, you have reason to believe that Geneva Jenkins' mother was familiar, at least, with one aspect of the narcotic conspiracy, is that correct?

A. That's correct.

Q. Now you—when you testified after the tap was [89]over in this Court on April 16, 1971, and you were asked a question by me . . .

MR. ADELMAN: Mr. Palmer, what page?

MR. PALMER: Page 323. (Quoting) "Question: Was Geneva Jenkins' mother at all the object of your inquiry; was she in any way shape, or form, thought to be involved in a narcotics conspiracy?" "Answer: We didn't have any knowledge one way or the other." Is that correct?

WITNESS: That's correct.

BY MR. PALMER:

Q. But now you're saying after review, you've come up with this knowledge, that she had some knowledge of the conspiracy? Is that correct?

A. I'm saying that through analysis of the transcript of the phone calls between Geneva and her mother, I have every reason to believe now, you know, that there is grounds for suspicion that she did.

Q. Now Agent Cooper, in the first tap you spoke about, the so-called Jackson Tap, was your role a supervisor in that?

A. It was not.

Q. What was your role in that tap?

A. I was an agent assigned to a regular shift on the intercept.

Q. Six or eight hours a day, you were on the phones listening, right?

[90] A. Tweleve hours a day.

Q. Tweleve hours, all right. In this case, was your role any different? What was your role in this case?

A. I was the supervising agent. By that, I was not there 24 hours a day, but I spent a great deal of every day at the intercept.

Q. And in fact, you applied for, or submitted the affidavits in this case, is that correct?

A. Yes. I did.

Q. Now the affidavit you submitted was on January 24th of 1970, is that correct?

A. I believe so, yes, sir.

Q. And you worked very closely with Mr. Sullivan of the Major Crimes Unit in preparing affidavit and throughout the course of this wiretap, is that correct, sir?

A. That's correct.

Q. Was he the direct supervising Assistant United States Attorney in charge of this wiretap?

A. Yes, he was.

Q. And you, personally, made reports to him, is that correct?

A. That's correct.

Q. All right. Now prior to obtaining the wire tap order on January 24th from Judge Smith, did you and Mr. Sullivan have any discussions concerning limitations on what would be [91] overheard?

A. Yes, we did.

Q. And when did that discussion with Mr. Sullivan occur?

A. I have no way of pinpointing exactly when the discussions occurred, but I do know that we had such discussions prior to that.

Q. And who was present at these discussions?

A. I'd be guessing.

Q. And what was concluded as a result of these discussions?

A. That there was a certain—there were certain categories of telephone calls that should not be listened to.

Q. And what were they, sir?

A. These fell into restricted areas. These were telephone calls between an attorney and his client in a discussion of a pending case . . .

THE COURT: What was that second thing?

WITNESS: An attorney and his client in the discussion of a pending case.

THE COURT: Oh, I see.

WITNESS: (Continuing) The priest-penitent relationship and doctor-patient relationship. All of these were restricted conversations and were not to be intercepted under the law.

[92] By Mr. Palmer:

Q. Those were the three categories that were not to be intercepted, is that correct?

A. Correct, sir.

Q. All other calls were to be intercepted and recorded 24 hours a day, is that correct, sir?

A. Those were not the specific orders.

Q. Well, what were the specific orders, Agent Cooper, if you had any orders?

A. The orders were to listen to the telephone call, to begin to listen—first of all, this is long after we have been able to determine who the individuals are which—who are calling regularly on the intercept. There is a period of time where . . .

The Court: Wait a minute . . .

Mr. Palmer: Excuse me, . . .

The Court: . . . before you leave that, let me be clear. Are you saying that these discussions as to limitation of the calls was after you had discovered from prior listening who the persons were?

Witness: No, no—my discussions with the Assistant U.S. Attorney? Mr. Sullivan?

The Court: Yes.

Witness: Prior to the intercept.

The Court: Before the intercept ever . . .?

[93] Witness: Yes, sir.

The Court: Well, what did you mean by your last answer there, that you gave, that this was after you had discovered who some people were?

Witness: Well, I was trying to further explain the problem that the agents face when it comes to placing limitations on recording a conversation.

Mr. Palmer: If I may get back to my question, if Your Honor please.

The Court: Yes.

By Mr. Palmer:

Q. The only instructions you had, sir, if I understand you correctly, is that the only calls you were not to monitor were attorny-client concerning a pending case, (1); (2) priest-peritent, and (3) a doctor and his patient, is that correct?

A. There were other instructions, if I can articulate them; in other words, if there was a call that appeared to us to be privileged, but we could not categorize it, we should make a

note of it and see that the information got to myself, or delivered to the Assistant U.S. Attorney, Mr. Sullivan, as soon as possible.

Q. What were those instructions?—this was before the tap started now, right?

A. Yes.

[94] Q. All right. What other instructions did you receive from Mr. Sullivan concerning limitation on calls?

A. I have just given you exactly what I represented to the agents, that if a call should come in that doesn't fall into those categories that appears to be, let's say, totally out of the realm of the purpose for which we were suppose to be on the line, that we should record the call, make a note of it and pass the information on to Mr. Sullivan through me.

Q. All right. So in any event, regardless of the nature of the call, even if they were, in fact, totally non-narcotic-related, you were to record them, preserve them and then report this to Mr. Sullivan, is that correct, sir? Isn't that what you just said?

A. No, I'm not saying if they are totally non-narcotic-related. That was the area where we were suppose to have an eye on.

Q. Let me ask you this, Agent. Now I believe you indicated that you instructed the agents that if there was an area of calls that appeared to be non-narcotic-related—right?—not related to this alleged conspiracy, they were to be alerted to that fact, is that correct?

A. That is correct.

Q. And being alerted to the fact, they were to record the conversation, make a recording of it, and then alert [95] Mr. Sullivan of that fact, is that correct?

A. Basically, yes.

Q. All right. So what I'm saying is that regardless of the nature of the call, except those three privileged categories, all calls were to be recorded whether narcotics-related, or otherwise, preserved and then passed on to review by Mr. Sullivan, is that correct, sir?

A. Basically, that is correct, sir.

Q. That is correct, sir, is it not?

A. Basically, yes.

The Court: When you say, "basically", let's find out what they were. I don't understand these qualifications. I'm trying to find out what were the instructions.

WITNESS: Well, of course, the only difference is that I would not explain it that way, what Mr. Palmer is saying . . .

THE COURT: Well, explain it your way.

WITNESS: Well, we knew of occasions where telephone calls may be placed and that it would be difficult to determine whether it was narcotic-related, or not. We assumed that once the agent manning the tap developed some area of expertise in determining what is a narcotic-related call and what is not a narcotic-related call, that there should come a time when a call would come in that they might determine is non-narcotic-related and these are the calls that [96] we were addressing. This is what we were talking about.

THE COURT: I'm still not clear. Are you saying that apart from the three absolute categories, that the listener was to record all calls; those that were narcotic-related were so classified and those that were ambiguous were turned over to you and Mr. Sullivan? Is that what you're saying to me?

WITNESS: Not exactly, Your Honor.

THE COURT: Well, what are you saying?

WITNESS: My whole question, or the answer to this question goes to other foundations that, I think, should be laid . . .

THE COURT: Other what?

WITNESS: A foundation that I think should be laid before I answer the question . . .

THE COURT: Well, lay the foundation and answer the question.

WITNESS: It's a very difficult matter for agents initially involved in a wire intercept to make such determinations right off the bat, towards the beginning of the intercept, as to basic things, such as, just what is a narcotics-related conversation, who are the individuals involved, what exactly are they talking about. These are things that do not become apparent until some time after the intercept has been in operation. This was my experience in [97] Jackson and this, again, was my experience in this particular instance.

THE COURT: All right. Now what do you do in those circumstances?

WITNESS: In the beginning of an intercept?

THE COURT: Yes.

WITNESS: You listen to the call.

THE COURT: Everything?

WITNESS: Well, yes as though . . .

THE COURT: All right—everything, except these three?

WITNESS: That's correct, sir.

THE COURT: All right, no does there ever come a time when you change that procedure and if so, when?

WITNESS: Of course, it was never stated the way I'm explaining it, Your Honor, but . . .

THE COURT: There was what?

WITNESS: The prohibition that I am trying to explain now was never stated the way I am explaining it; but being that I was very close to the situation, I can attest that this was the case, that we were aware of the prohibition against non-related calls, but . . .

THE COURT: Assuming that you were aware of it, what we're trying to find out is when did you put it in operation? [98] WITNESS: Well, . . .

THE COURT: The limitation, that is.

WITNESS: . . . in effect, Your Honor, there were no limitations placed on the interception of calls in this particular operation, in this particular instance.

THE COURT: Well, I believe I asked you that question at a hearing in 1971 and you answered the same way. . .

WITNESS: Yes, sir.

THE COURT: . . . that you monitored every call.

WITNESS: Yes, sir, with the exception of . . .

THE COURT: Or the effect of it was, I believe I asked you whether you had knowledge of *any steps* taken by any agent, or by yourself, to limit the calls and I believe your answer was that you knew of none.

WITNESS: That's correct.

THE COURT: Is that still your answer?

WITNESS: Yes, it is.

Tr. 140—41

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THE COURT: Agent Cooper, you have testified that you assisted Mr. Kellogg in the preparation of this "Call Analysis", is that correct?

WITNESS: Your Honor, I said that I helped him in the preparation of the transcripts, the typewritten transcripts from the tapes. I did not sit down with him on this "Call Analysis".

THE COURT: Well, in this "Call Analysis", there are a number of categories that are set forth, "NS", meaning

narcotics in substance, it says; "NP", narcotics in part; "ME", mere evidence; "A", ambiguous; "R", a recording where all you got was a recording; "UNRE", which is unrelated but you listened with reasonable expectation to find something related to narcotics, and then "Unrelated", period. Who devised those categories?

WITNESS: Mr. Kellogg, I believe.

THE COURT: Beg your pardon?

WITNESS: I believe Mr. Kellogg did.

THE COURT: Did you assist him in devising those categories?

WITNESS: No, sir, I did not.

THE COURT: You did?

WITNESS: I did not.

THE COURT: Well, do you know where he got the information to place in each of those categories?

WITNESS: He got the information from the transcripts of the tapes.

THE COURT: And not from any of the reports that you had made to Mr. Sullivan?

WITNESS: I don't believe so, sir. I think he got the principal amount of his information from the transcripts of the tapes that were made and added to, just prior to the hearing three years ago.

THE COURT: And this was after the fact?

WITNESS: That's correct.

Tr 222—23

Q. What I'm asking you, sir, is whether or not you are aware that in the Court of Appeals, the Government counsel conceded, or took the position, sir, that the transcript of intercepted calls at the N Street premises revealed a local narcotic distribution setup?

A. Yes, sir.

Q. Now is that position, sir, in accord with your own assessment of what the transcript of those calls, that is, the N Street calls showed, sir?

A. Yes, sir, it is.

Tr. 308—09

Q. And is it fair to say that based on an analysis of those reports, that approximately—but 40 percent of the calls as you analyzed them at the time were related to narcotics, or narcotics transactions?

A. I'd say 40 percent of the calls that I reported, I cannot say that I analyzed all of the calls at that time.

Q. And 60 percent were unrelated to the narcotics conspiracy, or the enterprise, is that correct?

A. According to our analysis at that time.

Q. But you're saying that the analysis of 60 percent might not have been all inclusive, might not have covered all of the calls, is that correct?

A. I was speaking about my own personal interpretation of each and every call.

Q. However, of all the calls, approximately 500 that were intercepted, is it fair to say that in your judgment, approximately 60 percent, as the Court had found in the prior hearing, were unrelated to narcotics, or narcotic transactions?

A. Based upon our original assessment, yes, sir.

Q. In fact, on June 24th—I'm sorry, February 24th of 1970, when you applied for a search warrant for 1425 N Street, Northwest—(handing document to witness) that is your affidavit for that search warrant, is it not, sir?

A. (Examining document) Yes, sir, it is.

Q. And in it you state there were approximately 500 conversations intercepted and recorded. Of these conversations, approximately 40 percent were related to narcotics and narcotics transactions, is that correct, sir?

A. That is correct.

Q. And that purported to analyze all of the calls in this case, is that correct?

A. Yes, sir, I believe it did.

Q. And 60 percent of the calls, therefore, as Judge Waddy had found, were unrelated to narcotics, or narcotic transactions, is that correct?

A. They were found to be unrelated, yes.

Q. They were found to be unrelated, is that correct?

A. That's correct.

THE COURT: Now did there come a time when you changed your idea about the characterization of these calls?

WITNESS: Well, yes, sir, there did.

THE COURT: When was that?

WITNESS: Prior to the hearings which were scheduled in April of 1971, sir. I did. . .

THE COURT: Prior to which hearing, the original suppression hearing, or the motion to reconsider?

WITNESS: Well, the suppression hearing; that's the only hearing at which I personally gave testimony, as I recall.

PHILIP L. KELLOGG took the stand, and being duly sworn, was examined and testified as follows:

Tr. 352

A. It was prepared between the end of April 1971, and the end of May 1971.

Q. And did you work on the preparation of that particular document?

A. I did.

Q. Did you have any direct assistance in the preparation of that document?

A. From any other person, no, sir.

Q. Now why was that document prepared by you?

A. There were extensive hearings before this Court in April of 1971 to develop the factual basis which underlay various motions which had been filed on behalf of various defendants in the case. I believe it was on the 27th of April, 1971, that this Court issued a written opinion—ruling on all of those motions and granting the defense's motion to suppress all of the evidence in the case which flowed from these intercepts, on the basis of a ruling that there was a violation of the so-called minimization clause in the federal wiretap statute.

Subsequent to that ruling and on the basis of my own analysis of the Court's opinion and in consultation with my superiors and other members of the United States Attorney's Office who had participated in similar proceedings, but other cases, I undertook to prepare a detailed call-by-call analysis of the intercepted communications in this case. I did so—let me strike that and simply say that it seemed to me in analyzing the Court's opinion that the Court relied heavily upon the factual assertion that 60 percent of the calls were unrelated to narcotics, an inference which flowed from that; that the interception of those 60 percent of the calls was impermissible, that is, unlawful pursuant to the terms of the order in the statute. It was that factual matter that I sought to get at and I add candidly that obviously as an advocate, I did represent the United States in that proceeding.

Q. Now in the course of this investigation, did you come to know an individual, Special Agent Cooper, from the [354] Bureau of Narcotics and Dangerous Drugs?

A. Yes, sir.

Q. Did he play any part in the formulation of the "Call Analysis"?

A. No, sir.

Tr. 370

THE COURT: Now that's the question I want to ask you. Do I understand then that these categories are the sole result of a determination by the legal staff of the United States Government setting forth the litigation stance of the United States and not the result of any evidence, or any assistance given by anyone who participated in the wiretap?

WITNESS: Well, yes, sir, I think that's correct. I prepared them. First of all, as I've indicated in my testimony, I prepared them and largely alone. I did so, (1) the categories were constructed by myself on the basis of consultation with my superiors and on the basis of the similar categories which had been utilized in advance of Judge Robinson in the Tantillo Case. The basic factual material, of course, that I utilized in—that I analyzed were the transcripts which, of course, had been prepared by the investigative personnel. But it is certainly correct that these categories and the analysis of the calls as such were prepared by myself and they are not the product of the investigative personnel, except to the extent that I relied on their transcriptions of the calls and occasionally assistance to discern the meaning of a particular call.

Tr. 373

WITNESS: I understand. And furthermore, it has been stipulated from the beginning that there are no calls in this entire intercept which were not intercepted as a discretionary matter. It's undisputed that every single call that came over the line was intercepted.

Tr. 435—36

Q. Now I believe your last answer was that no agent was consulted, no federal narcotics agent, in constructing the 7 categories of your "Call Analysis"?

A. That is correct, Mr. Palmer, but I guess I have to add this caveat. I hate to qualify everything, but as I indicated in my testimony on direct examination, I prepared the categories, constructed them after a fairly detailed analysis of the materials that had been prepared in the Tantillo Case and also after a consultation the various members of the

United States Attorney's Office who had responsibility for that matter. In their preparing the categories, which are essentially the same, they may well have had consultation and advice of narcotics agents, but I had none of substance, with Agent Cooper, or anyone else related to this tap.

Q. And the other U. S. Attorneys, you have no knowledge that they, in fact, consulted with any agents? You're just speculating, they may have, you said, is that correct?

A. Yes, indeed.

Tr. 441—42

Q. Now as agents manning a tap get the information over the intercept, as it is coming in, did you know at the time you constructed this analysis as to what categories they were using insofar as including or excluding calls as unrelated to the narcotic enterprise, they actually did it at the time the tap occurred?

A. My only answer would be is that I was unaware of any such categories—the use of any such categories on their part.

Q. In other words, when you went through your analysis, I don't know, 6 or 8 months after the tap concluded, had you interviewed any agents who were manning the taps at the time in determining what they, in fact, included as part of what they were authorized to receive, and that part they excluded from what they were authorized to receive? In other words, for example, we have in evidence Agent Cooper's report to Harold L. Sullivan, Exhibit No. 2, dated January 26, 1970, in which it was reported that there were a total of 17 conversations; of these, 8 involved narcotic transactions. Now did you attempt to go to the original agents insofar as each of the day's tap proceeded and determined what they, in fact, in their own categories considered narcotic, narcotic-related, or unrelated to the criminal enterprise?

A. No.

Q. In other words, your construction was strictly an attorney's without any relationship to what the agents in life and in fact did, is that correct, sir?

A. Yes, without respect to any standards they may have used, yes.

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Tr. 449

Q. And so is it fair to say that the "Call Analysis" as constructed by the Government at the time is totally unrelated in fact by virtue of discussion, or otherwise, totally unrelated to what may, or may not have been going on in the agents' mind as they actually intercepted these calls?

A. Yes, they contained—the "Call Analysis" contains my judgment and not the judgments of any agents.

Tr. 680—81

GLENNON L. COOPER again resumed the stand, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY THE COURT:

Q. Agent Cooper, at a hearing—at a prior hearing, you have testified that you were the supervising agent of the intercept which was placed upon the N Street number and the other two numbers, am I correct?

A. That is correct, Your Honor.

Q. And also that there were times when you, yourself, did the listening?

A. That's correct.

Q. The question I wish to ask you is this, whether at any time during the course of the wiretap—of the intercept, what if any steps were taken by you or any agent under you to minimize the listening?

A. Well, as I believe I mentioned before, I would have to say that the only effective steps taken by us to curtail the reception of conversations was in that instance where the line was connected to—misconnected from the correct line and connected to an improper line. We discontinued at that time.

Q. Do I understand from you then that the only time that you considered minimization was when you found that you had been connected with a wrong number?

A. That is correct, Your Honor.

SUPREME COURT OF THE UNITED STATES

No. 76-6767

FRANK R. SCOTT, etc. and
BERNIS L. THURMON, etc.

Petitioners,

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the District of Columbia Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition. The parties are also directed to brief and argue the question of standing.

October 11, 1977

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